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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-609

JOSEPH H. MORTON, ET AL., *Petitioners,*

v.

CHARLES COUNTY BOARD OF EDUCATION, ET AL., *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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JOSEPH H. MORTON, ET AL., *Petitioners,*

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CHARLES COUNTY BOARD OF EDUCATION, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Joseph H. Morton, et al., petition for a writ of certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Opinion of the Court of Appeals (App. A, p. 1a *infra*) is unreported at this time. The Judgment is reproduced as Appendix B, p. 16a, *infra*. The Opinion of the District Court (App. C, p. 17a, *infra*) is reported at 373 F.Supp. 394.

JURISDICTION

The Judgment of the Court of Appeals was entered on July 24, 1975, and this petition for certiorari is being filed within 90 days of that date. The jurisdic-

tion of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

In a racial discrimination case against a previously segregated school system, where petitioners proved that at the time of, and immediately subsequent to, dismantlement of the segregated system

(a) the percentage of black teachers and principals sharply declined;

(b) the School Board made far greater efforts to recruit whites than blacks;

(c) black teacher applicants had to meet higher qualifications standards than white applicants; and

(d) assignments of teachers were made on the basis of race

1. Did the majority of the Court of Appeals err in declining, in accordance with *Keyes* (413 U.S. 189 (1973)) and *Chambers* (364 F.2d 189 (4th Cir. 1966)), to hold that the burden shifts to the School Board to justify its hiring and promotion practices by clear and convincing evidence.

2. Did the majority of the Court of Appeals err in declining to apply to the School Board's hiring and promotion practices the "effect" discrimination test under *Wright* v. *Council of City of Emporia,* 407 U.S. 451 (1972) rather than a racial motivation standard.

3. Did the Court of Appeals err in refusing to honor the Maryland State Board of Education's findings of discriminatory faculty practices by Charles County

school officials, and in refusing to enforce the State Board's mandate that those practices be discontinued.

4. Did the majority of the Court of Appeals err in refusing to permit petitioners to maintain a class action.[1]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent portions of the Fourteenth Amendment, the United States Code and the Maryland Code are set forth as Appendix D, p. 51a, *infra*.

STATEMENT OF THE CASE

This case presents in bold relief a widespread practice of school districts undertaking student desegregation to alter their faculty employment policies to the prejudice of black teachers and administrators. It arises in a "Deep South" district whose student bodies remained segregated until the late 1960s.[2] When the Charles County Board of Education finally desegregated its student bodies 13 years after *Brown*, it immediately undertook radical changes in its faculty

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[1] While the class action question is presented in this case, we do not make it a separate reason for granting the writ. If certiorari is granted, we will contend that the dissenting judge of the Court of Appeals was correct on the class action issue (see pp. 14a-15a, *infra*) and that a reversal on the merits should be accompanied by reversal on the class action question in order to provide fully effective relief.

[2] Charles County was a "Deep South" community when it undertook student desegregation in 1967 and it remains so. As the investigative Committee appointed by the Maryland State Board of Education stated in its 1970 Report to the Board (A. 837), Charles County "is still basically a rural society. The races are segregated socially and economically. . . . The traditions of the Deep South run deep. The County as a whole still tends to be resistant to change." ("A" references are to the Joint Appendix in the Court of Appeals.)

hiring and promotion practices: prior to 1967 the faculty of the school system had been almost 50% black, and exactly half the schools had black principals. But black teachers and principals deemed good enough for black students were viewed by the school system in a different light when it came to integrated schools and classrooms. In 1967-68, when white students were finally to be taught by black teachers, the school system initiated new hiring and promotion practices which resulted in the precipitous decline of the percentage of the system's black faculty and black principals. Instead of continuing the half white, half black faculty proportion, in 1967 the School Board began a consistent policy of hiring four white teachers for each black. Moreover, while the number of black principals remained static, the number of white principals was doubled. In a few short years the black teacher component dropped from 44% to 27% and the blacks decreased from 50% to 30% in the school principal positions.

The issues arising from this course of action by the School Board with respect to the system's faculty component are of paramount importance, for they affect many hundreds of school districts across the nation required to develop unitary school systems and many thousands of black administrators, teachers and applicants for employment with these districts. A brief review of salient facts and the proceedings in this case will place these issues in proper perspective:

1. The Period of Segregation Prior to 1967

For many years after this Court's 1954 decision in *Brown* v. *Board of Education*, the Charles County Board of Education continued to operate a segregated

school system. As late as the 1964-65 school year, only 296 black students attended white schools and only 2 white students attended black schools in a system whose student enrollment number 8,999, of whom 45 percent were black (A. 707-09). Full student desegregation occurred for the first time in the 1967-68 school year (A. 509-10, 707-13). While faculty segregation had also been continued until the middle 1960's, the district had continued to hire and promote substantial numbers of qualified blacks, although to teach or supervise almost exclusively black students. Thus in 1964-65, 50 percent of Charles County's school principals were black, and in the last year before student desegregation, 44.2 percent of the teachers were black (A. 129-32, 704-13, 1180).

2. Racially Discriminatory Employment Practices Between 1967 and State Board Ruling in 1970

When the Charles County Board of Education finally yielded to this Court's rulings and integrated its student bodies in 1967, this school system which had previously hired an almost half-black faculty suddenly changed its hiring and promotion practices. This change occurred at the very moment that black teachers and principals were reassigned to teach white students. Thus, with the onset of student desegregation, a school system which had previously hired almost 50% black teachers began hiring four white teachers for each black. That 80%-20% white-black hiring quota which was implemented *each year* after 1967-68, soon caused a precipitous drop in the percentage of black teachers in the Charles County School System. In the first year of student desegregation, the 44.2 percent black faculty dropped to 37.3 percent (A. 1180). By 1969-70, two years later, the black teacher

component had declined another 7 points, to 30.4 percent (A. 1180). Thus within the first three years after desegregation of the student bodies, there was almost a one-third decline in the proportion of black teachers in the system. By the time of the 1973 trial, the black teachers had decreased to 27 percent. Since respondents continued to hire according to the 4-1 ratio, the faculty proportions continue to decline to an ultimate one-fifth black faculty.

The sharp decline in black teacher hiring was paralleled among black principals. Of the 16 principals in 1964-65, eight were black. In the very first year of full student desegregation, there were twice as many white principals (12) as blacks (6). By the time of the 1973 trial, the number of black principals remained 8 while the number of white principals had more than doubled, to 18 (A. 1125-32, 707-13, 129-32).[3]

The reduction in the black teacher-principal component is explained by the School Board's recruiting and hiring practices during the crucial post-1967 period of student desegregation. Thus, between 1967 and 1970

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[3] In 1973 the Department of Health, Education and Welfare investigated respondents' application for funding under the Emergency School Aid Act (20 U.S.C. §§ 1601 *et seq.*) and denied it. HEW wrote in a letter to the school district:

> "Your district has had a disproportionate reduction of black principals since the 1964-65 school year. In 1964-65, there was a total of 16 principals, of whom eight (8) were black and eight (8) were white. In 1964-65, black principals represented 50 percent of the total number of principals in the district and white principals represented 50 percent. However, in 1972-73, black principals represent 29 percent of the total number of principals and white principals represent 71 percent of the total. Black principals have decreased by 25 percent over the period, while white principals have increased by 137 percent." (A.704-05).

Charles County recruited at 156 predominantly white colleges, while visiting only 26 predominantly black colleges. During that same period white recruiters made visits on 197 occasions, while blacks made only 20 trips (A. 959-76, 871).

A comparison of the qualifications of black and white persons hired during these years further demonstrates the discrimination in Charles County's hiring practices. It was far easier for white applicants to secure professional employment than for blacks with comparable qualifications (A. 873-958). The school system hired numerous whites without degrees and with the lowest state qualifications, while hiring virtually no blacks with such limited qualifications.[4] Similarly, during these years, the white professional employees hired by the school system generally had less teaching experience than the blacks hired. Moreover, among the teachers hired who did have teaching experience, blacks had a greater average teaching experience (*id.*). In sum, the record of diminishing black faculty due to discriminatory recruitment practices was bolstered by undisputed evidence that disparate qualification standards were applied.

In addition to limiting black hiring and leadership in the years immediately following student desegregation, the school system also discriminated in its assignment of blacks already employed. Between 1967

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[4] During the 1967-68 school year, 21 whites hired (16.2% of the new white employees) had a 4, 5, or 6 state department certification status, while only one black hired (2.7% of the new black employees) had such a low rating. In the same year respondents hired 20 whites without college degrees while hiring only one black without a degree. For the two following years, the Charles County school system hired 23 whites but only two blacks with a 4, 5, or 6 rating.

and 1970, respondents' faculty assignments were racially identifiable in almost two-thirds of its school faculties, and the District Court did grant a declaratory judgment with respect to these racial assignments (A. 1025-26, 1217-24).

Finally, the record shows that the school system consistently employed a disproportionately low percentage of blacks in central office administrative positions, among the superintendent's most immediate assistants and among secretaries, maintenance workers and cafeteria managers. Only black custodians were employed in high numbers (A. 808-09, 1179, 1161-66, 317-30, 1213-14, 1216, 977-1019).

3. The State Board's Discrimination Findings and Remedial Orders

The discriminatory practices just reviewed were the subject of repeated complaints to the Charles County Board of Education. When respondents failed to provide any redress, a formal complaint of discrimination was filed with the Maryland State Board of Education in 1969. Hearings were held by the State Board in late 1969 and early 1970. Seventeen witnesses, including 3 of the individual petitioners herein, testified concerning discrimination suffered by blacks in hiring, promotion, demotions and discharges (A. 783). At the conclusion of the complainants' testimony, the State Board adopted a suggestion by Charles County school officials and created a 4-member special committee to investigate in Charles County "the status of integration, any deficiencies that can be noted, and suggestions for future guidance" (*id.*). After a comprehensive investigation (A. 393-98), the State Board's Committee issued a Report to the State Board on April 24, 1970 which generally upheld the

allegations of racial discrimination in the School Board's hiring and promotion practices (A. 789-90, 792-95, 799-800, 804-05, 808-10, 813-16).[5] In addition, the Committee recommended corrective measures to redress the discriminations found (A. 850-60). On July 16, 1970, the State Board of Education upheld the findings of its Committee and issued a series of directives essentially adopting the remedial measures suggested by the Committee (A. 862-70). The Board's remedial orders required sharp modification in the school system's hiring and promotion practices, ordered deliberate and extensive recruitment of qualified black personnel, significant increases in recruiting at black or predominantly black colleges by black recruiters, and the adoption of a policy and practice of employing, assigning and promoting black staff members in order to produce "greater equity" and to "insure black students a greater opportunity for motivation and achievement" (A. 866-68).

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[5] For example, concerning the School Board's hiring practices, the Committee found:

> "The Committee stresses that whether or not the hiring practices of the Charles County school system are or were purposely intended to exclude or keep to a minimum the number of blacks employed, the hiring practices have had just that effect. Whether or not the original intent was or is to discriminate against blacks the result has been and is one of discrimination" (A. 815).

On the School Board's hiring and recruiting policies, the Committee found:

> ". . . the evidence before the Committee does indicate that Charles County school officials have fallen into de facto discriminatory hiring practices by following a procedure of recruiting almost exclusively at predominantly white colleges, using primarily white recruiters" (A. 793).

4. Continuing Employment Discrimination after 1970

Despite the findings and remedial directives of the State Board in 1970, and the filing of this suit in 1971, the Charles County Board of Education continued the same discriminatory faculty practices. Respondents continued to hire at the same 80 percent white-20 percent black ratio which caused a continuing drop in the proportion of black faculty (A. 873-958, 1180). The percentage of black principals remained low at 30 percent, the School Board adding three white principals and only one black in the three years prior to the 1973 trial (A. 1176).

These hiring data reflected respondents' continuing discrimination in recruiting. Despite the State Board's Order requiring the Charles County Board of Education to engage in deliberate and extensive recruitment of qualified black personnel and to place black staff members on all recruiting teams, respondents continued to visit far more white colleges than black colleges with far more white than black recruiters. Moreover, the School Board's continuing double standard toward white and black applicants was compounded when its Director of Personnel issued a 1971 directive requiring that only "superior" and "above average" black applicants be interviewed without placing any such limitation on the interviewing and selection of white applicants (A. 1119-21). Finally, the Charles County system continued its racial assignment of faculties despite the State Board's express directive that its school faculties must have "balanced assignments" (A. 868). During the years between the State Board ruling and the 1973 trial, about half of the school faculty assignments were racially identifiable (A. 1025-26, 1217-24).

5. The Complaint in This Case and the District Court's Ruling

When the County School Board failed to implement the 1970 remedial directives of the Maryland State Board of Education, six black applicants and employees filed this action in 1971.[6] They alleged individual acts of employment discrimination and sought to represent a class of blacks who had likewise been refused employment or promotion or been demoted by respondents on grounds of race. The District Court ruled that petitioners could not maintain a class action, but it allowed nine additional applicants and employees to intervene as named plaintiffs. After a trial at which petitioners presented the above record of racially discriminatory actions and policies, the District Judge rejected most of petitioners' claims. Although he found racial discrimination in faculty assignments and in the failure to promote a single black Vice-Principal, the District Judge gave these findings no weight at all when he reviewed the specific challenged actions of the school officials and their discriminatory general hiring policies. Despite the history of segregation prior to 1967 and the unrefuted proof that the Charles County Board of Education, coincident with student integration, initiated vastly different hiring and promotion procedures which had the effect of progressively reducing the black faculty component, the District Judge refused to shift the burden of proof to the School Board to explain its hiring and promotion actions. In his view, "[t]his case is nothing like *Chambers* v. *Hendersonville Board of Education*, 364 F.2d 189 (4 Cir. 1966)" because the respondents had not discharged black faculty at the time of desegregation (p. 29a *infra*).

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[6] Petitioners invoked jurisdiction of the District Court under 28 U.S.C. § 1331, 1343.

The District Court also declined to apply the principle of *Wright* v. *Council of City of Emporia*, 407 U.S. 451 (1972): that even if not racially motivated, desegregating school systems are proscribed from taking actions which have the effect of impeding desegregation. Instead of granting relief against the Charles County Board's faculty employment actions, which clearly had the effect of reducing the black faculty component, the Court denied relief because of petitioners' failure to prove to its satisfaction that the School Board's actions had been motivated by racial prejudice (see, e.g., pp. 29a, 36a *infra*). Finally, the District Court refused to honor, or give any weight at all to, the State Board of Education Committee's 1970 finding of racially discriminatory faculty practices by respondents, and the ensuing remedial orders of the State Board itself directing abandonment of those practices (pp. 26a-27a *infra*).

6. The Court of Appeals' Decision

Dividing two to one, a panel of the Court of Appeals affirmed the District Court's ruling on the ground that the District Court properly placed the burden of proof on petitioners because the 1967 student desegregation was "voluntary" and because no discharges of black faculty members accompanied the desegregation. In the Court's view, the immediate precipitous drop in the *black faculty* proportion upon integration of the student bodies was explained or somehow justified by the expanding *white student population* in the county. In short, the majority found no justification to shift the burden of proof to the School Board under this Court's *Keyes* decision and the Fourth Circuit's *Chambers* ruling (pp. 5a-6a *infra*).

A detailed critique of the District Court decision in the dissenting opinion of Judge Butzner (pp. 10a to 15a *infra*) emphasized that the District Court ruling was marred by two basic errors of law: (1) application of the *Keyes-Chambers* rule required that the burden of proof should have been shifted to the School Board because the Charles County school system had a history of segregation and because the post-1967 hiring and promotion policies were shown to have a racially discriminatory effect—a burden of explanation which the school system failed to meet; (2) applying this Court's *Wright* decision, the District Court's premise that petitioners were required to show purposeful racial discrimination was fallacious.

In the "reason for granting the writ" we urge that vital questions are presented concerning the faculty dimension of school desegregation, and that the narrow distinctions espoused by the court below against the governing authorities invite perpetuation among public school faculties of the racial segregation which this Court has ordered eliminated "root and branch". *Green* v. *County School Board,* 391 U.S. 430, 438 (1968).

REASON FOR GRANTING THE WRIT

THIS COURT'S REVIEW IS REQUIRED TO ASSURE EFFECTIVE DESEGREGATION IN THE FACULTY COMPONENT OF FORMERLY SEGREGATED PUBLIC SCHOOL SYSTEMS.

The major student desegregation undertaken throughout the South under this Court's *Green* and *Swann* rulings has increased rather than reduced resistance to faculty desegregation. No problem has been more unyielding in the process of school desegregation

than the substantial decline in the employment of black teachers and supervisors which far too frequently has occurred following the desegregation of pupils.[7] This case presents in clearest illumination practices indulged in by many school districts to continue discrimination and segregation in the faculty component of the school system. Moreover, we urge the necessity of this Court's review because the lower courts' refusal to apply established Fourteenth Amendment principles tangibly threatens the perpetuation in faculty employment of the racism formerly practiced under compulsion of state law.

I. THE DECISION BELOW SEVERELY ERODES THE IMPORTANT PRINCIPLE THAT SHIFTS THE BURDEN OF JUSTIFICATION TO A SCHOOL SYSTEM WHICH CURTAILS ITS BLACK FACULTY COMPONENT AT THE TIME OF STUDENT DESEGREGATION.

In *Keyes* v. *School District No. 1, Denver, Colorado,* 413 U.S. 189 (1973) this Court quoted and adopted the holding of the Fourth Circuit in *Chambers* v. *Hendersonville City Board of Education,* 364 F.2d 189, 192 (1966) that ". . . in a school system with a history of segregation, the discharge of a disproportionately large number of Negro teachers incident to desegregation 'thrust[s] upon the School Board the burden of justifying its conduct by clear

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[7] See Amicus Curiae Brief of National Education Association in *United States* v. *Georgia,* (5th Cir. No. 30,338) reproduced in Hearings Before Senate Select Committee on Equal Educational Opportunity, 91st Cong., 2d Sess. (1970), 92d Cong., 1st Sess., (1971) (herein "Hearings") pp. 5025, 5042, 5074; Hearings, Part 10—"Displacement and Present Status of Black School Principals in Desegregated School Districts," Appendix 5, pp. 5147-5390; Hearings, "NEA Report of Task Force Survey of Teacher Displacement in Seventeen States," pp. 1082, 1124.

and convincing evidence.' " (413 U.S. at 209). In this case, the majority below rejects the applicability of the *Keyes-Chambers* principle, because in Charles County in 1967 student desegregation occurred "voluntarily" and because no actual discharge of black teachers occurred. Such a distinction disregards the underlying meaning and purpose of the *Keyes-Chambers* rule.

While in Charles County the student desegregation did not occur pursuant to a specific court order, its ultimate action was belatedly undertaken to comply with this Court's order in *Brown*. Moreover, and more importantly, while not discharging black teachers, the School Board achieved the same result of curtailing its black faculty component by initiating discriminatory hiring and promotion procedures. Thus a school system with almost 50% black teachers suddenly began hiring four white teachers for each black. In the very first year following student desegregation, the black faculty dropped from 44% to 37%; and in two more years to 30%. The four to one white-black hiring ratio has continued each year after 1967, even after the Maryland State Board of Education in 1970 expressly ordered a sharp modification in the School Board's hiring and promotion practices and directed the deliberate and extensive recruitment of qualified black personnel. Just as Charles County initiated new teacher hiring procedures at the time of desegregation, it stopped promoting blacks to the important leadership position of school principal. While the number of black principals remained static, whites were continually appointed to these positions and more than doubled in number, resulting in a decrease in the black principal proportion from 50% to 30%.[8]

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[8] The majority of the Court of Appeals accepted respondents argument that demographic changes in the Charles County popu-

The School Board thus accomplished by its hiring and promotion policies what the school board in *Chambers* accomplished by discharges. As the dissenting Judge below stated:

> "The record demonstrates that, incident to desegregation of the schools, the board disadvantageously treated a disproportionately large number of black personnel, not by discharge, as mentioned in *Keyes,* but by its hiring and promotion policies. For the purposes of shifting the burden of proof, the difference between discharging black teachers and refusing to hire or promote them is inconsequential. The board's practices, though more subtle than outright discharge, nevertheless disproportionately diminish the black faculty" (p. 11a *infra*).

Though perhaps "more subtle than outright discharge," the subtlety of the hiring discrimination was certainly not lost on the system's black pupils who perceived the sharp curtailment in the black faculty proportion. From their point of view, the discrimination was very real and, as this Court has held, the impact of faculty discrimination on the students is the paramount concern. *Rogers* v. *Paul,* 382 U.S. 198, 200 (1965); *Bradley* v. *School Board,* 382 U.S. 103 (1965); *Swann* v. *Board of Education,* 402 U.S. 1, 18 (1951).[9]

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lation during the 1960-1970 decade somehow explained the precipitous drop in the black faculty component. But as Judge Butzner persuasively pointed out in dissent, the record reflects that the School Board "does not look only to the availability of white teachers living in the county, and for years both black and white teachers have been recruited from colleges all over the country. Consequently, the number of black applicants who live in the county is irrelevant" (See p. 13a *infra*).

[9] While this case involves school desegregation, it, of course, also concerns employment discrimination. In cases of employment discrimination, statistical evidence has uniformly been held to estab-

During the middle and late 1960's thousands of Southern black school administrators and teachers were discharged, demoted and refused employment at the time of desegregation.[10] The *Chambers* principle which this Court adopted in its 1973 *Keyes* decision provides an important deterrent to the continuation of the practice of eliminating black faculty at the time that these faculty members are assigned to teach white children. Numerous school districts across the country are still in the process of desegregation. The pernicious effect of the majority opinion below is to erode the important continuing protection furnished by the *Keyes-Chambers* rule, which places a heavy burden on the school district to justify its action. This Court's review is required where the opinion below invites evasion of full desegregation by discriminatory faculty hiring practices.

II. THE DECISION BELOW ERODES THIS COURT'S *WRIGHT* RULING BY REFUSING TO APPLY ITS OBJECTIVE STANDARD TO THE FACULTY DESEGREGATION AREA.

In *Wright* v. *Council of City of Emporia*, 407 U.S. 451 (1972), this Court enunciated an important prin-

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lish a *prima facie* case shifting the burden to the employer to rebut the inference of discrimination arising therefrom. See, *e.g.*, *Brown* v. *Gaston Co. Dyeing Machine Co.*, 457 F.2d 1377, 1382 (4th Cir. 1972); *Rowe* v. *General Motors Corp.*, 457 F.2d 348, 357-58 (5th Cir. 1972); *Pettway* v. *Cast Iron Pipe Co.*, 494 F.2d 211, 225, n. 34 (5th Cir. 1974). The lower courts surely erred in failing to apply these authorities to petitioners' pattern or practice of discrimination claim. Moreover, in treating petitioners' individual clams of discrimination, the lower courts failed to shift the burden of proof to the employer School Board in accordance with the "order and allocation of proof" set forth in this Court's opinion in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 800-04 (1973).

[10] See p. 14 n. 7 *supra*.

ciple of school desegregation law flowing from *Brown, Green,* and *Swann*: in evaluating a desegregating school district's actions it is the effect which is controlling rather than the motivation of school officials. As stated in *Wright* (407 U.S. at 462), where the court below had upheld creation of a new school district "designed to further the aim of providing quality education" (442 F.2d 570, 572), the focus must be upon "the effect—not the purpose or motivation—of a school board's action in determining whether it is a permisible method of dismantling a dual system. The existence of a permissible purpose cannot sustain an action that has an impermissible effect."

The District Judge, affirmed by the ruling below, refused to apply the *Wright* "discriminatory effect" test to the faculty practices of the Charles County School Board. For example, in denying relief to petitioner William Griffis, a black principal for 16 years in the segregated school system, who was demoted one year after his school was integrated, the District Judge required petitioner to prove that the demotion was "made on the basis of race, or because of any racial prejudice" (p. 36a *infra,* see also p. 15a). As dissenting Judge Butzner emphasized, the District Court's Opinion contains a "basic error of law that flaws this case: the fallacious premise that the evidence must reveal purposeful discrimination in order for the complainants to prevail" (p. 12a *infra*). To Judge Butzner's conclusion that the *Wright* "effect" test should have been applied— and that its application requires a finding of unlawful School Board conduct here—the majority below makes no response. Plainly, Judge Butzner is correct in rejecting any operative distinction which would make the *Wright* rule inapplicable

to the faculty component in school desegregation. This Court's review is thus required to vindicate the applicability of an "effect" standard for desegregation of the faculties of formerly segregated school systems no less than their student bodies.

Moreover, the refusal by the Court below to apply an objective standard to the School Board's employment policies sharply curtailing the black faculty component, cuts directly against the grain of this Court's objective standard in employment cases covered by the Civil Rights Act of 1964. *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971).[11] Under *Griggs*, that is true even though the employer has had no past segregation record such as existed in Charles County and even though the private employer is free of constitutional limitations. Surely this Court ought review a decision which makes inapplicable to public employment the objective standard of *Griggs* which now applies in all private employment.

III. A MAJOR CONSTITUTIONAL ISSUE ARISES FROM THE LOWER COURT'S REFUSAL TO HONOR AND GIVE EFFECT TO THE STATE'S OWN FINDINGS OF THE SCHOOL BOARD'S DISCRIMINATORY PRACTICES.

The duties of the Maryland State Board of Education under the Fourteenth Amendment and state law were duly invoked in 1969 by charges filed with the Board alleging widespread discrimination against

[11] While *Griggs* was brought under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.*), its standards have generally been applied in employment discrimination cases brought under 42 U.S.C. §§ 1981 and 1983. See, *e.g.*, *Vulcan Society* v. *Civil Service Commission*, 490 F.2d 387, 394 n. 9 (2d Cir. 1973); *Castro* v. *Beecher*, 459 F.2d 725, 733 (1st Cir. 1972).

black faculty by Charles County school officials.[12] Following three days of hearings, the State Board appointed a four member investigating committee. The State Board's Committee conducted a comprehensive investigation and in April 1970 issued a unanimous report. Finding respondent School Board guilty of discriminatory practices and policies inhibiting the hiring and promotion of black faculty, the State Board's Committee recommended corrective measures to redress the discriminations found (A. 789-90, 792-95, 799-800, 804-05, 808-10, 813-16, 854-59). Thereafter, in July 1970 the State Board of Education itself upheld the findings of its Committee and issued directives requiring respondent Charles County Board of Education to modify sharply its hiring and promotion practices and to deliberately and extensively recruit qualified black personnel (A. 866-68).

While the District Court reluctantly received into evidence the rulings of the State Board and its Committee, it chose to disregard the findings of the State Board's Committee approved by the State Board. Moreover, it declined to enforce or give any weight to the requirements mandated by the State Board itself

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[12] Under the Constitution of the State of Maryland, responsibility for the operation and maintenance of the public education system is placed upon the State (Maryland Constitution, Article VIII, § 1). That State responsibility is vested in the State's Board of Education by Article 77 of the Maryland Code. Section 113 of Article 77 broadly prohibits any board of education from making "any distinction or discrimination in favor of or against any teacher . . . on account of race . . . with reference to . . . appointment, assignment, compensation, promotion, transfer, dismissal, . . ." Under § 6 of the same Article, the State Board of Education must "cause the provisions of this article to be carried into effect", and must "decide all controversies and disputes that arise under it, and their decision shall be final."

seeking to end the faculty practices which were sharply reducing the proportion of black teachers and principals in the Charles County school system (pp. 26a-27a *infra*). The Court of Appeals similarly refused to honor the State Board Committee's findings or to enforce the State Board's remedial mandate that the discriminatory faculty practices be discontinued (pp. 8a-10a *infra*). Indeed, the majority even criticized the dissenting opinion's reliance on the State Board Committee's Report and the State Board's remedial orders in finding a "history of segregation" in the Charles County system (p. 9a *infra*).

Thus the federal courts below have shrugged aside, disregarded and declined to give effect to the State's own action, taken pursuant to its responsibility under State law and under the Fourteenth Amendment.[13] That Amendment provides that no "state" shall deny equal protection to its citizens, and it is settled that the state itself bears the equal protection responsibility for the discriminatory acts of its agents or subdivisions. See *The Civil Rights Cases* 109 U.S. 3 (1883); *Ex parte Virginia*, 100 U.S. 339, 347 (1880); *Gomillion* v. *Lightfoot*, 364 U.S. 339, 344-45 (1960); *Reynolds* v. *Sims*, 377 U.S. 533, 575 (1964). Accordingly,

[13] Both the Court of Appeals and the District Court state (pp. 9a, 27a *infra*) that the State Board and its Committee were not charged with and did not purport to apply constitutional or statutory standards. But in finding racially discriminatory employment practices and in directing corrective action by the school system, the State agency was discharging its duty to enforce the Equal Protection Clause of the Fourteenth Amendment. Moreover, the State Board and its Committee were bound to enforce Article 77, § 113 of the Maryland Code which essentially duplicates the Fourteenth Amendment in prohibiting any Board of Education from racial discrimination in matters of faculty employment, promotion and assignment.

when the highest public education authority of Maryland made an appropriate investigation resulting in findings that its subordinate agency—the Charles County School Board—was engaging in discrimination against black faculty and ordered corrective action, the State was exercising its duty under the Fourteenth Amendment precisely as the Amendment contemplates and requires.[14]

An important question is thus raised by the lower courts' failure to give effect to the action properly undertaken by the State Board under its equal protection obligation, as well as under the State law barring discrimination in faculty hiring. Given the high importance of state respect for equal protection, the state's own compliance efforts are entitled to full faith and credit in a federal litigation seeking Fourteenth Amendment remedies. Cf. *Brewer* v. *Hoxie School District*, 238 F.2d 91 (8th Cir. 1956).[15] The occa-

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[14] Moreover, under the Federal Constitution the State Board's ruling was binding on the Charles County Board of Education, and it had no standing to challenge it. The Charles County Board is a creature of the State of Maryland and cannot be heard in federal court to challenge the rulings of the State Board of Education. *Williams* v. *Mayor and City Council of Baltimore*, 289 U.S. 36, 40 (1933); *Trenton* v. *New Jersey*, 262 U.S. 182, 187-88 (1923). Since that is true even where as in *Williams* the subordinate agency claims that the State is acting in *violation* of the Fourteenth Amendment, it is surely even more the case where, as here, it is the State which has sought to *secure* Fourteenth Amendment compliance and it is a subordinate School Board which has flouted its remedial directives.

[15] Since Maryland courts honor and give effect to remedial orders of the State Board of Education (see *Wilson* v. *Board of Education*, 234 Md. 561, 563-66, 200 A.2d 67, 68-70 (1964)), the federal courts below should have done the same as a matter of pendent jurisdiction. *United Mine Workers* v. *Gibbs*, 383 U.S. 715, 725 (1966); cf. 28 U.S.C. § 1739.

sions on which officials of the formerly segregated states have themselves undertaken forthright corrective action in the school desegregation area are unfortunately few and far between. Cf. *McDaniel* v. *Barresi*, 402 U.S. 39 (1971). Surely when that happens, as here, federal courts cannot disregard that action, giving a clean bill of health to School Board officials for the same conduct which the State has found racially discriminatory.

Maryland having found generally discriminatory hiring and promotion policies practiced by the Charles County Board of Education and having ordered their discontinuance, there was provided to the District Court an additional predicate for award of injunctive and compensatory relief. Thus, both as a matter of legal compulsion and as a matter of comity and judicial wisdom, the lower courts should have given appropriate effect to Maryland's discrimination findings and remedies. Their failure to do so presents an important additional question for this Court's review.

CONCLUSION

For the several separate and compelling reasons stated, the writ should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 74-1817 and 74-1818

JOSEPH H. MORTON, WILLIAM L. GRIFFIS, MILBOURNE F. HULL, VERONICA ADAMS, ANNIE C. YATES, MARY LINDA PLATER, infant, through her father, CHARLES L. PLATER, SR., MARY THERESEA WASHINGTON, infant, through her mother, MRS. DORIS C. WASHINGTON, CORDELIA E. KING, ELNORA PINKNEY, RAYMOND F. SANDERLIN, HEROME F. THOMPSON, LACEY TILLOTSON, SANDRA WASHINGTON HEARNS, KENNETH WRIGHT, JOSEPH A. JONES, BERTHA KEY,

versus

CHARLES COUNTY BOARD OF EDUCATION, JAMES E. WILSON, individually and as a member of the Charles County Board of Education, B. PATRICK COX, individually and as a member of the Charles County Board of Education, JOSEPH L. GARDINER, individually and as a member of the Charles County Board of Education, DANIEL C. GARDNER, individually and as a member of the Charles County Board of Education, JOAN L. BOWLING, individually and as a member of the Charles County Board of Education, MRS. ALFRED PARETTA MUDD, individually and as a member of the Charles County Board of Education, JESSE L. STARKEY, individually and as Superintendent of Schools, Charles County, Maryland, Charles County Board of Education,

Appellees-Appellants

Cross-appeals from the United Staes District Court for the District of Maryland, at Baltimore. Roszel C. Thomsen, Senior District Judge.

Argued March 5, 1975 Decided July 24, 1975

Before BRYAN, Senior Circuit Judge, and BUTZNER and FIELD, Circuit Judges.

Elliott C. Lichtman (Joseph L. Rauh, Jr., John Silard, Rauh and Silard, Mrs. Juanita Jackson Mitchell, Mitchell and Mitchell, Jack Greenberg, James M. Nabrit, III, Norman Chachkin and James C. Gray, Jr., on brief) for Appellants in No. 74-1817 and Appellees in 74-1818; William L. Marbury and E. Stephen Derby (Judith K. Sykes, Edward S. Digges and Richard J. Clark on brief) for Appellees in No. 74-1817 and Appellants in No. 74-1818.

FIELD, Circuit Judge:

This action was instituted in January of 1971 by eight black individuals alleging discriminatory conduct in the operation of the public school system of Charles County, Maryland. Six of the plaintiffs were adults who charged that they and the class of individuals which they purported to represent had been refused employment or promotion, or had been demoted or discharged by the defendants on grounds of race. The other two plaintiffs were infants who were students in the Charles County School System and alleged that they sued on behalf of themselves and as representatives of a class consisting of all black students in the school system who were being deprived of their civil rights because the defendants had maintained racially identifiable faculties. The parties engaged in broad and exhaustive discovery procedures and on November 9, 1973, the court determined that the prerequisites to a class action had not been met by either the adult or infant plaintiffs. Thereafter, nine additional adults moved to intervene as plaintiffs, alleging that they had been the victims of racial discrimination on the part of the defendants.

The district court conducted a twelve-day trial and filed an opinion in which it engaged in a meticulous review of the evidence and made detailed findings of fact. The claims

of discrimination of the fourteen adult plaintiffs[1] were carefully examined and with the exception of one claim were found to be without merit. In the case of Mrs. Elnora Pinkney the court found that the failure to appoint her as principal of an elementary school in 1969 was the result of racial discrimination. With respect to the claims of the student plaintiffs relative to the racial composition of faculties, the court found that the School Board had attained an appropriate faculty ratio as required by *Nesbit* v. *Statesville City Board of Education*, 418 F.2d 1040 (4 Cir. 1969), in all but five of its twenty-six schools.[2] The court noted that in three of these five schools the shifting of one teacher would bring the school into conformance with the test suggested by the plaintiffs and that in all other schools the shifting of only two teachers would be necessary. The only school falling substantially below this test was the Vocational Educational Center which included a number of specialized faculty positions.

Based upon the findings in its opinion the court entered an order which (1) granted judgment in favor of the defendants with respect to the claims of all the adult plaintiffs with the exception of Mrs. Pinkney; (2) declared that the ratio of black and white faculty members in each school should be not less than 75 per cent nor more than 125 per cent of the ratio of black teachers throughout the system;[3] (3) granted judgment in favor of Mrs. Pinkney

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[1] After the institution of this suit one of the plaintiffs, Ortis J. Cobb, was permitted to withdraw as a party plaintiff on October 12, 1972.

[2] The plaintiffs suggested that the standard of *Nesbit* would be met where the ratio of black teachers to white teachers in each public school in the county was not less than 75 per cent nor more than 125 per cent of the ratio of black teachers to white throughout the entire system.

[3] On this issue the court accepted the standard suggested by the plaintiffs. *See*, n.2, *supra*.

in the amount of $15,796, being the difference between the salary actually paid to her and the salary she would have received as principal of an elementary school for the years 1969 to 1974;[4] and (4) awarded attorneys' fees of $12,000 payable to counsel for Mrs. Pinkney and the infant plaintiffs.

Upon their appeal, the plaintiffs request that we reverse the judgment of the district court and direct that it take the following remedial measures. *First*, grant declaratory and injunctive relief prohibiting continuance of the hiring, promotion and demotion practices which plaintiffs allege have caused continued attrition in the percentage of black faculty members in the school system. *Second*, issue an injunction requiring the institution of affirmative hiring, promotion and demotion policies designed to restore the ratio of black principals and teachers to that which existed in the school system at the time desegregation was undertaken. *Third*, set aside the adverse findings made by the district court against the thirteen adult plaintiffs, and reconsider their claims by applying a presumption of racial discrimination and placing upon the defendants the burden of proving that discriminatory policies played no part in the rejection, non-promotion or demotion of each individual plaintiff. *Fourth*, award compensatory and other relief to all members of the class of unsuccessful black applicants for promotion and hiring in the Charles County School system since 1968.[5]

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[4] The Board was further directed to compensate Mrs. Pinkney on the basis of a principal's salary until her retirement and to make such additional contributions to the Maryland Teachers Retirement System on her behalf as would have been made had she held the position of principal since 1969.

[5] The plaintiffs contend that the alleged discriminatory practices injured all unsuccessful black applicants for positions in the Charles County school system and that the district court plainly erred in refusing to permit the plaintiffs to pursue their class action. They further suggest "that a special master could be appointed to receive

Primarily the plaintiffs contend that the district court failed to give the appropriate presumptive weight to the statistical evidence of racial discrimination in the Board's employment practices. They point to the fact that whereas in 1966-67, the year prior to complete desegregation, 44.2 per cent of the teachers were black, the proportion of black teachers had declined to 30.4 per cent in 1969-70, and that in the same years the percentage of black principals had dropped from 37.5 per cent to 30.7 per cent. These statistics, the plaintiffs argue, call for the invocation of the principle set forth in *Chambers* v. *Hendersonville City Board of Education*, 364 F.2d 189, 192 (4 Cir. 1966), that "in the face of the long history of racial discrimination • • • the sudden disproportionate decimation in the ranks of Negro teachers raise[s] an inference of discrimination which thrust[s] upon the School Board the burden of justifying its conduct by clear and convincing evidence." The district judge rejected this contention of the plaintiffs, and we agree with him that this is not a *Chambers* case. First of all, unlike *Chambers* where the school system resisted "the mandate of *Brown* until forced to do so by litigation," *Id.* at 192, the Charles County Board had taken affirmative steps to desegregate its schools in the light of the evolving law and it is conceded that complete desegregation in the county had been voluntarily accomplished in 1967. Also, unlike *Chambers*, in the present case there was no sudden disproportionate decimation in the ranks of Negro teachers incident to the complete integration of the school system. On the contrary the district judge found that "there is no claim or evidence that any teacher or principal was discharged because of his or her race." Common to *Chambers* and its progeny in this circuit [6] was the fact that in each case a sub-

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the individual applications for reliefs," with directions that the master apply the presumption of discrimination set out in "Third" above.

[6] *See*, Walston v. County School Board of Nansemond Cty., Va., 492 F.2d 919 (4 Cir. 1974); North Carolina Teachers Ass'n. v. Asheboro City Bd. of Ed., 393 F.2d 736 (4 Cir. 1968).

stantial number of black teachers had been discharged when the schools were integrated, and the significance of this factors was recognized by the Court in *Keyes* v. *School District No. 1, Denver, Colo.*, 413 U.S. 189, 209 (1973), where the Court stated:

> "Again, in a school system with a history of segregation, the *discharge* of a disproportionately large number of Negro teachers incident to desegregation 'trust[s] upon the School Board the burden of justifying its conduct by clear and convincing evidence'." (Emphasis added).

In addition to the foregoing, the record clearly demonstrates that the statistical changes upon which the plaintiffs rely so heavily were not the result of any discriminatory hiring policies of the Board, but rather were the result of dramatic demographic changes which occurred in Charles County in the 1960-1970 decade. Charles County is a small county in southern Maryland which is experiencing rapid growth as the suburbs of the District of Columbia expand. Between 1960 and 1970 the population increased 46.4 per cent from 32,500 to 47,700. In that same period the number of students in public schools increased from 7,400 in 1960 o 13,000 in 1970, and had further increased to 16,300 in 1973. This rapid growth in both population and school enrollment consisted primarily of an increase in white population and white pupils. While in 1970 the black population of the county had slightly increased in absolute numbers, the percentage of black population had declined from 34 per cent in 1960 to 29 per cent in 1970; and the percentage of blacks in the school population had declined from 45.7 per cent in 1960 to 39.9 per cent in 1970 and dropped even lower to 34 per cent in 1973.

During this same period the number of black principals in the school system increased from six to eight and in 1973 stood at 30.7 per cent while the number of black vice-principals increased from four to six and reached about 45 per cent. The number of black administrators in the central

office of the school system increased from four to ten, being 22 per cent of that job classification. The number of black teachers had increased from 198 to 207, although the percentage decreased to 27 per cent. The district court carefully analyzed the school statistics in the light of the percentage decrease of blacks in the general population as well as the school system, and also took into consideration the statistical data bearing upon the percentage of blacks in the relevant employment pool from which the School Board, of necessity, drew a substantial number of its employees. Upon consideration of all of the relevant statistical data and underlying evidence bearing thereon, the district judge concluded that the evidence did not disclose a pattern of racial discrimination which required or justified the application of the so-called *Chambers* rule. The record solidly supports the findings of the district court and, assuredly, 'they are not clearly erroneous.' *Williams* v. *Albemarle City Board of Education*, 485 F.2d 232 (4 Cir. 1973); *Bridgeport Guard., Inc.* v. *Members of Bridgeport C. S. Com'n.*, 482 F.2d 1333 (2 Cir. 1973).

The proposal of the plaintiffs that the court direct the Board to institute an affirmative policy which will restore the ratio of black principals and teachers to that which existed in the system prior to desegregation of the schools

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[1] In Mayor v. Educational Equality League, 415 U.S. 605 (1974), the Court criticized the use of "simplistic percentage comparisons" and observed:

> "We share the view expressed in the dissent that facts in a case like the instant one, 'when seen through the eyes of judges familiar with the context in which they occurred, may have special significance that is lost on those with only the printed page before them.' • • • That is one reason why we believe that the Court of Appeals, 'with only the printed page before [it] . . . .' erred in reversing the District Court. The judge most 'familiar with the context in which [the facts] occurred . . .' was obviously the District Judge, since he heard and viewed the testimony and other evidence presented." *Id.*, at 620, n.20.

would require the court to close its eyes to the changes which have taken place in Charles County during the past ten years. We are unaware of any constitutional principle which would require that the racial ratios which existed in the school system of the county in 1966-67 be rigidly maintained *ad infinitum* despite the changing character of the surrounding area. On the contrary, the inevitability of such changes was recognized by the Chief Justice in *Swann* v. *Board of Education*, 402 U.S. 1, 31-32 (1971).

> "It does not follow that the communities served by such systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of students bodies once the affirmative duty to desegregate had been accomplished and racial discrimination through official action is eliminated from the system. This does not mean that federal courts are without power to deal with future problems; but in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary."

In our opinion the present case falls within this observation of the Chief Justice, and the record satisfies us that despite the changing population ratio the Board has taken reasonable and affirmative steps to bring substantial numbers of qualified blacks into every facet of the school system.

Finally, a brief comment about the special committee report upon which the dissent appears to place considerable reliance. In the spring of 1969 a dispute arose over the selection of majorettes at La Plata High School and at the suggestion of the Board of Education and the NAACP a committee was appointed by the State Board of Education to make an investigation of a variety of complaints and report its recommendations to the Board. The committee

was purely of an *ad hoc* nature and, as noted by the district judge, was not charged to apply either constitutional or statutory standards in its investigation. The committee's investigation was not conducted as an adversary proceeding nor were the individuals interviewed by it subject to cross-examination. The State Board discussed the committee report with representatives of the Charles County school system and the NAACP and thereafter adopted some of the committee's recommendations, modified some and refused to adopt others. Again, as noted by the district judge, the action of the State Board on the report did not purport to be based upon either constitutional or statutory principles.[8]

While the dissent does not go so far as to accept the plaintiffs' contention that the district court was bound by the committee report and had a responsibility to enforce its findings as well as the recommendations of the State Board, it nevertheless relies upon the report as demonstrating "a history of segregation" under the *Keyes* formula. This, we think, accords the report an unwarranted role in this litigation. While the district judge permitted the committee report to be introduced into evidence, he ultimately reached the conclusion that its relevant findings lacked support and made his independent findings based on the evidence before him. In doing so he acted well within the permissible area of his discretion. Even if the report were conceded some official gloss its admissibility would be highly questionable, *see Moss* v. *Lane Company, Incorporated*, 471 F.2d 853 (4 Cir. 1973); *Cox* v. *Babcock and Wilcox Company*, 471 F.2d 13 (4 Cir. 1972), and in any event, it "is in no sense binding on the district court and is to be given no more weight than any other testimony given at trial." *Smith* v. *Universal*

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[8] It was conceded by the plaintiffs that none of them had seen fit to pursue the available Maryland statutory remedy by which a person aggrieved by actions of the county school administration may present a complaint to the School Board and, if dissatisfied with the action of the Board, appeal to the State Board of Education. Anno. Code of Md., Art. 77 § 59 (1969 Repl. Vol.)

Services, Inc., 454 F.2d 154, 157 (5 Cir. 1972). The fallacy of placing any operative reliance on the report is more readily apparent if we reverse the circumstances. Had the state committee given *carte blanche* approval to the manner in which the Charles County schools were being operated, we doubt that anyone would seriously contend that such a report would constitute a defense to the plaintiffs' law suit or that it would be entitled to any substantial evidentiary consideration on the issues.

In our opinion the district court granted full and appropriate relief and we affirm its judgment in all respects.[9]

AFFIRMED

BUTZNER, Circuit Judge, dissenting:

This case reaches the wrong result because of two basic errors of law. The first error is the allocation of the burden of proof, which was placed on the black complainants. It should have been placed on the school board in conformity with Keyes v. School District No. 1, Denver Colorado, 413 U.S. 189, 209 (1973), which teaches that "in a school system with a history of segregation, the discharge of a disproportionately large number of Negro teachers incident to desegregation 'thrust[s] upon the School Board the burden of justifying its conduct by clear and convincing evidence.'" Therefore, the initial inquiry should be to determine whether the Charles County school system has a history of segregation.

Until 1954 the county board operated a dual system, and not until 1967 were all of the schools desegregated. In the course of integrating the pupils, the racial composition of faculties underwent changes that were investigated by a special committee appointed by the Maryland State Board

[9] The cross-appeal of the Board of Education challenges the award of damages to Mrs. Pinkney, but we are not persuaded that the finding of the district court on her claim was clearly erroneous.

of Education. The committee filed an extensive report condemning the racial discrimination practiced by the school board in hiring and promoting the schools' professional and administrative staffs. The State Board of Education approved the committee's recommendations calling for the extensive recruitment of qualified black personnel and the establishment of fair and clear procedures for promotion that would apply equally to all candidates. When it became apparent that the school board was disregarding these recommendations, black students, parents, and faculty instituted this action. The first factual predicate for shifting the burden of proof mentioned by *Keyes* is "a history of segregation." The school board's former operation of a dual system of schools and the report of the State Board of Education amply demonstrate that this prerequisite has been met.

The second element of the *Keyes* formula is also satisfied. The record demonstrates that, incident to desegregation of the schools, the board disadvantageously treated a disproportionately large number of black personnel, not by discharge, as mentioned in *Keyes*, but by its hiring and promotion policies. For the purposes of shifting the burden of proof, the difference between discharging black teachers and refusing to hire or promote them is inconsequential. The board's practices, though more subtle than outright discharge, nevertheless disproportionately diminish the black faculty. The record shows that when the pupils were segregated, 50 percent of the principals were black and 50 percent were white. After desegregation of the schools, the percentage of black principals decreased to 30 percent and that of white principals increased to 70 percent. Before desegregation, black teachers constituted 44.2 percent of the faculties, but by 1973 the ratio had dropped to 27.4 percent.

I therefore conclude that both of *Keyes'* factual prerequisites for shifting the burden of proof have been satis-

fied and that it was error to fail to place on "the School Board the burden of justifying its conduct by clear and convincing evidence." 413 U.S. at 209.

The school board, however, contends that even if the burden shifted, the judgment should be affirmed. But a proper examination of the record refutes its claim. This brings us to the second basic error of law that flaws this case: the fallacious premise that the evidence must reveal purposeful discrimination in order for the complainants to prevail. This is contrary to Wright v. Council of the City of Emporia, 407 U.S. 451 (1972). *Wright* teaches that in deciding whether a school board has acted lawfully, a court must focus "upon the effect—not the purpose or motivation—of a school board's action." 407 U.S. at 462. Rather than ascribe good or evil motives to the board, it is sufficient to look to the effect of its conduct on the professional staff.

The record disclosed that despite the admonition of the State Board of Education to recruit qualified black personnel extensively, the school board has curtailed recruitment. In 1967-1968 there were 14 recruiting visits by blacks to various colleges. In 1968-1969 there were none, but during the same term there were 76 recruiting visits by whites. Recruiting by blacks picked up temporarily after the State Board of Education criticized the county board, but in 1973-1974 the number of visits dropped to two. The lack of the board's recruitment efforts has a significant effect —the board hires four white teachers for every black. This disparity cannot be attributed to unequal qualifications. From 1967 to 1973 the board hired 47 white teachers and only 4 black teachers with no degree and low state certification. In 1971 the supervisor of personnel services directed his assistant to select for interviews from among the black applicants only those with a superior or above average rating. No similar limitation for white applicants was disclosed. It is quite clear, therefore, that the disparity in the board's hiring of blacks and whites cannot be at-

tributed to rational quality control. Moreover, the absence of fair and clear procedures for promotion that apply equally to all candidates has resulted, during the years following integration of the pupils, in doubling the number of white principals while the number of black principals remained static.

The school board also places emphasis on the demographic changes in Charles County, intimating that an increase in the number of white pupils justifies the proportionate shift to white teachers. This argument flies in the face of Chambers v. Hendersonville City Board of Education, 364 F.2d 189, 192 (4th Cir. 1966), where we held "reduction in the number of Negro pupils [does] not justify a corresponding reduction in the number of Negro teachers." Furthermore, this court has never subscribed to the theory that the racial composition of faculties should mirror the racial composition of student bodies. Indeed, if this new theory were to be applied conversely where black pupils outnumber white, some of the largest cities in this circuit would have to radically change the racial composition of their administrative and teaching staffs, an obligation that this court has never heretofore seriously considered.

The school board also contends that the decrease in proportion of black teachers is due to lack of enough black applicants in the county to staff the schools and to inadequate housing in the county. Yet the board does not look only to the availability of white teachers living in the county, and for years both black and white teachers have been recruited from colleges all over the country. Consequently, the number of black applicants who live in the county is irrelevant. Further, white employees recruited from outside the county have to find housing, so the lack of housing is also irrelevant.

In sum, the board has utterly failed to justify its conduct by clear and convincing evidence as required by Keyes

v. School District No. 1, Denver, Colorado, 413 U.S. 189, 209 (1973). I would, therefore, reverse the district court's judgment on this aspect of the case and remand for the entry of class relief that would assure the termination of the board's discriminatory hiring and promotion policies. The board should be required to establish definitive objective standards for employment and promotion and to apply them alike to all personnel "in a manner compatible with the requirements of the Due Process and Equal Protection Clauses of the Constitution." Chambers v. Hendersonville City Board of Education, 364 F.2d 189, 193 (4th Cir. 1966); *see also* Walston v. County School Board of Nansemond County, Virginia, 492 F.2d 919 (4th Cir. 1974); North Carolina Teachers Association v. Asheboro City Board of Education, 393 F.2d 736 (4th Cir. 1968); Wall v. Stanly County Board of Education, 378 F.2d 275 (4th Cir. 1967).

The district court denied 13 claims pressed by individuals who charged they were prejudiced by the board's discriminatory employment policies. It also declined to allow the case to proceed as a class action embracing all black applicants who had been denied teaching positions or promotions.

The basic errors of law that invalidate the denial of injunctive relief also permeate the dismissal of the individual claims. The court erroneously placed the burden of proving racial prejudice or discriminatory purpose on the individual claimants. For example, a black principal, William L. Griffis, who had served for 16 years in a black school was demoted over the protest of all the teachers in his school one year after the pupils were integrated. The district court accepted the board's conclusory statements that he was a weak administrator and that his supervisors had not recommended him. It made no finding of the underlying facts about his alleged lack of ability, and it ruled that Griffis had failed to prove that the board's decisions

were "made on the basis of race, or because of any racial prejudice." However, as I have previously mentioned, the principles of law dictated by Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189, 209 (1973), and Wright v. Council of the City of Emporia, 40 U.S. 451 (1972), require the school board to assume the burden of proof and the court to evaluate the evidence by ascertaining the effect of th school board's actions, not its motivation.

The class action aspect of the case is not essentially different from other employment cases involving racial discrimination for which there is ample precedent for class relief. *E.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971); Walston v. County School Board of Nansemond County, Virginia, 492 F.2d 919 (4th Cir. 1974); Rock v. Norfolk and Western Railway Co., 473 F.2d 1344 (4th Cir. 1973); North Carolina Teachers Association v. Asheboro City Board of Education, 393 F.2d 736 (4th Cir. 1968). Accordingly, I would vacate those portions of the judgment that dismiss the class action and the claims of individual complainants and remand the case for reconsideration in light of *Keyes* and *Wright*.

APPENDIX B

Judgment of Court of Appeals

[Caption Omitted]

APPEAL FROM the United States District Court for the District of Maryland.

THIS CAUSE came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

WILLIAM K. SLATE, II
Clerk

Filed July 24, 1975

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

CIVIL No. 71-64-T

JOSEPH H. MORTON, WILLIAM L. GRIFFIS, MILBOURNE F. HULL, VERONICA ADAMS, ANNIE C. YATES, MARY LINDA PLATER, infant, through her father, CHARLES L. PLATER, SR., MARY THERESA WASHINGTON, infant, through her mother, MRS. DORIS C. WASHINGTON,

Plaintiffs,

CORDELIA E. KING, ELNORA PINKNEY, RAYMOND F. SANDERLIN, JEROME F. THOMPSON, LACEY TILLOTSON, SANDRA WASHINGTON HEARNS, KENNETH WRIGHT, JOSEPH A. JONES, BERTHA KEY,

Intervening Plaintiffs

v.

CHARLES COUNTY BOARD OF EDUCATION, JAMES E. WILSON, individually and as a member of the Charles County Board of Education, B. PATRICK COX, individually and as a member of the Charles County Board of Education, JOSEPH L. GARDINER, individually and as a member of the Charles County Board of Education, DANIEL C. GARDNER, individually and as a member of the Charles County Board of Education, JOAN L. BOWLING, individually and as a member of the Charles County Board of Education, MRS. ALFRED PARETTA MUDD, individually and as a member of the Charles County Board of Education, JESSE L. STARKEY, individually and as Superintendent of Schools, Charles County, Maryland, Charles County Board of Education,

Defendants.

Filed: March 6, 1974

Elliott C. Lichtman, of Washington, D.C., James C. Gray, Jr., of New York, N.Y. (Rauh and Silard, of Washington, D.C., Mitchell & Mitchell, of Baltimore, Md.; Jack Greenberg, James M. Nabrit, III, and Norman Shachkin, of New York, N.Y., of counsel) for plaintiffs and intervening plaintiffs.

William L. Marbury, E. Stephen Derby, Judith K. Sykes, of Baltimore, Md., and Edward S. Digges, of La Plata, Md., for defendants.

THOMSEN, District Judge

This action was instituted in January 1971 by eight black persons against the Charles County Board of Education (the Board),[1] the persons who were then members of the Board,[2] and the Superintendent (Starkey).[3]

Six of the plaintiffs alleged that they were suing on behalf of themselves and a class of black persons refused employment, refused promotions, demoted or discharged by defendants on grounds of race. They seek damages and injunctive relief under the Thirteen and Fourteenth Amendments, under 42 U.S.C. §§ 1981, 1982 and 1983, and

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[1] The Board had been an appointed board until 1970, when by statute, Acts of 1970, Ch. 386, Art. 77, § 35A, Anno. Code of Md., 1973 Cum. Supp., it became an elected board. The County School Board does not control the amount of its budget. The Board of County Commissioners determines the amount which shall be allowed to the School Board for each school year, usually in June for a year beginning July 1.

[2] Six of the defendants took office on December 14, 1970, after their election. No one of them had been a member before that date. A seventh member took office on the day this section was filed, and has not been added as a defendant. Two of the defendants (Cox and Daniel Gardner) resigned, on April 30, 1972, and June 30, 1972, respectively.

[3] Starkey became Superintendent on July 1, 1969, having been Assistant Superintendent or Deputy Superintendent since 1965.

under Art. 77, § 113[4] of the Annotated Code of Maryland. They claim that the amount in controversy for each plaintiff exceeds $10,000, and invoke jurisdiction under 28 U.S.C. § 1331, as well as §§ 1343(3) and 1343(4).

Two of the plaintiffs are students in the Charles County school system, who, through their parents, alleged that they were suing on behalf of themselves and as representatives of a class consisting of all students attending schools in Charles County who are being deprived of their civil rights because defendants have maintained racially identifiable faculties.

Although counsel had agreed among themselves that determination of the class action issue be delayed until the trial, the court, after extensive discovery, set the matter for hearing on November 9, 1973, and determined on that date that the prerequisites to a class action had not been met.[5]

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[4] Art. 77, § 113 provides:

"Discrimination on account of race, religion, color, national origin, or sex unlawful.

"It shall be unlawful for the State Superintendent of Schools or any of his assistants, and for any board of education and any superintendent of schools or any of his assistants to make any distinction or discrimination in favor of or against any teacher who may be employed in any of the public schools of this State, on account of race, religion, color, national origin, or sex except where the employment of a certain sex may be reasonably necessary by reason of the nature of the employment, it being the intent and purpose of this section that the provisions thereof shall apply with reference to the appointment, assignment, compensation, promotion, transfer, dismissal, and all other matters pertaining to the employment of teachers in the public schools in the State of Maryland."

[5] The court ruled that the requirements of subsection (a) (1) of Rule 23, F. R. Civ. P., had not been met, and that the requirements of (a) (3) and (a) (4) had probably not been met. The evidence at the trial supported this conclusion; the circumstances surrounding the individual claims varied greatly.

On November 23, 1973, nine persons moved to intervene as plaintiffs,[6] alleging acts of racial discrimination at various times, the first in 1964 and the last in 1973. The running of limitations was tolled during the period from the institution of this case as a class action on January 22, 1971, until this court ruled, on November 9, 1973, that class action treatment was inappropriate. *American Pipe & Construction Co.* v. *Utah*, —— U.S. ——, 42 U.S. L.W. 4155 (1974). Questions of limitations and laches with respect to some of the claims remain.

The case came on for trial on December 10, 1973. Testimony was taken on twelve days; more than 300 exhibits, some quite extensive, were offered. At the conclusion of the plaintiffs' case, the court granted the motion of the individual defendants other than Starkey, for a judgment in their favor in their individual capacity under Rule 41(b), F. R. Civ. P., and granted a similar motion by Starkey with respect to seven of the plaintiffs. Counsel for plaintiffs did not object to these rulings. The case proceeded against Starkey with respect to the claims of the other plaintiffs, and against the Board with respect to the claims of all plaintiffs. Elaborate post-trial briefs have been filed, and oral argument has been heard.

Some facts have been stipulated. The determination of other facts upon which the rights and obligations of the several plaintiffs and the several defendants depend require a consideration of: the history of the Charles County school system over the years; a mass of statistical information;[7] the various records of the individual plaintiffs and of others who were appointed to or considered for the positions in question; and the credibility and weight of the

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[6] Counsel for plaintiffs had advised the court and counsel for the defendants on October 1, 1973, that evidence would be presented at the trial concerning alleged acts of discrimination against those individuals.

[7] Without careful study some of the tables might be misleading.

testimony of the many witnesses who testified with respect to general policies as well as to the facts particularly applicable to the incidents in question.

Defendants moved for summary judgment because of plaintiffs failure to exhaust administrative remedies, but the parties agreed that the motion be argued at trial. Since a full evidentiary hearing has been held, a regard for judicial economy precludes staying decision or dismissing the case on this ground. There is no need to determine whether exhaustion of administrative remedies would otherwise be required, and whether the administrative remedies would otherwise be required, and whether the administrative remedies set out in Art. 77, § 150, Md. Code (1965 Repl. Vol.), and Art. 77, § 150, Md. Code (1969 Repl. Vol.) are adequate remedies. *See Gibson v. Berryhill*, 411 U.S. 564 (1973); *Humphrey v. Cady*, 405 U.S. 504, 517 (1972); *Hayes v. Secretary of Dept. of Public Safety*, 455 F.2d 798, 799-801 (4 Cir. 1972); *Flaherty v. Cannors*, 319 F. Supp. 1284, 1287 (D. Mass. 1970).

A. Alleged Pattern of Racial Discrimination

(1) History

Charles County is a rural county, with many small communities. It is bounded on the north by Prince George's County, a much larger county, adjacent to the District of Columbia. It is bounded on the other three sides by two rural counties, Calvert and St. Mary's, and by the Potomac River. It has only recently received a substantial increase in population as a result of the expansion of the Washington suburbs.

In 1956, one year after the second *Brown* opinion, 349 U.S. 294 (May 31, 1955), the Board adopted a freedom of choice policy for students entering the first grade in the 1956-57 school year. All elementary grades were desegregated on a freedom of choice basis by the 1960-61 year, all middle school grades by the 1961-62 year and all grades,

including high school, by the 1962-63 year. For the 1964-65 year the Board eliminated the requirement that requests for transfers be approved, and required all parents to make an affirmative choice, in order to be sure that the right of freedom of choice was understood and exercised without restriction. That is all that was required by even the subsequent decisions of the Fourth Circuit in 1965 and 1967. *Bradley* v. *School Board of the City of Richmond, Virginia*, 345 F.2d 310 (April 7, 1965); *Bowman* v. *County School Board of Charles City County, Virginia*, 382 F.2d 326 (June 12, 1967). Exercising that freedom of choice, the parents of 296 black children, out of a total of 4,076, chose to send their children to formerly all white schools during the 1964-65 year; only two white children attended a formerly all black school; and there were only a few black teachers in the formerly all white schools and a few white teachers in the black schools. At that time there were eight predominantly white schools and eight black schools.

The freedom of choice doctrine remained the law of the Fourth Circuit until May 27, 1968, when the Supreme Court decided *Green* v. *County School Board of New Kent County*, 391 U.S. 430.

Meanwhile, in the summer of 1965 (nearly three years before the decision in *Green*), just after Starkey became Assistant Superintendent, the Board directed the staff to develop a reorganization plan for the complete integration of the system by redistricting according to geographical location, and providing for the necessary new buildings to take care of such integration as well as the increase in population of the County. The plan was adopted by the Board in October, 1965; it was implemented for the high schools for the 1966-67 school year and for the elementary schools for the 1967-68 year.

As in many other school systems, the integration of the schools, followed by the abandonment of merger of some

old schools and the building of some new schools due to an increase in the population of the county, created new and difficult problems with respect to teachers and administrators. The population of Charles County increased 46% (from 32,000 to 47,000) between 1960 and 1970. The increase was predominantly white.[8] The student population increased from 7,410 (of whom 46% were black) in the school year 1960-61, to 16,358 (of whom only 34% were black) in the school year 1973-74.

(2) Principals and Other Administrators

The number of black principals has increased from 6 to 8 during the same period, but the number of white principals has increased even more rapidly, so that the percentage of black principals is now 30.7%, whereas it was 37.5% in 1966-67.

The number of black vice principals has increased from 4 to 6, and the percentage of black vice principals has remained about the same, 44.4% to 46%.

This integration has required a considerable readjustment of the staffs of the several schools. Beginning with the high schools in 1966-67, a policy was adopted that when a school was large enough to have a principal and a vice principal, if the principal of the school was white, the vice principal should be black, and vice versa. This policy has been generally followed.

The number of black administrators in the central office has risen from 4 to 10, the percentage from 20% to 22%.

No black teacher, principal, vice principal or administrator has been discharged during the years in question because of his or her race.

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[8] In 1960 the ratio of white to black was 66-34; in 1970 it was 71-29. A high percentage of the population in 1970 (44%) was under 18 years of age.

Plaintiffs contend that the abandonment of an Administrative Intern Program by defendants was racially motivated, and tends to prove a pattern of racial discrimination. This contention is not supported by the evidence; if any inference to that effect may be drawn from any of the evidence, the court finds that it is overcome by the weight of the evidence to the contrary.

Plaintiffs contend that there has been a pattern of practice of discrimination against blacks in the hiring and promotion of principals and administrators. The evidence does not support this contention. Aside from the case of Mrs. Pinkney, discussed below, the court finds that plaintiffs have not proved that any black person was not appointed principal or administrator because of racial discrimination.

The only occasions on which race was a controlling factor in the hiring or promotion of principals or vice principals was to carry out the policy of having a black vice principal where there is a white principal and a white vice principal where there is a black principal. The court finds that this policy at the present time in Charles County does not violate any constitutional right, and is a wise policy.

(3) Recruiting and Hiring Teachers

The number of teachers has, of course, increased. Almost all of that increase has been in the number of white teachers; the number of black teachers has risen from 198 to 207, but the percentage of black teachers has decreased from 44.2% to 27.4%, for reasons discussed below. In each year at least 17% of the new teachers employed have been black.

No plaintiff contends that he or she was not appointed a teacher because of his or her race. Indeed there is no evidence that any qualified black applicant has been denied employment as a teacher.

Plaintiffs contend, however, that the recruiting policies of the Board and superintendent are racially motivated. To support this argument, they note that the recruiters, most of whom are white, have over the years visited more predominantly white colleges and universities than predominantly black colleges and universities.[9] Since all public colleges and universities and most private institutions are integrated, the fact that a majority of the students attending a particular institution may be white, does not mean that such institution is not the best place to find a qualified black prospect. The Constitution does not require that a school board recruit poor prospects of any race.

The demand throughout the nation for qualified black teachers during the years in question has been great; Charles County offers fewer attractions for black teachers than such communities as the City of Washington and Prince George's County.

It is true that more white persons with low certification have been employed as teachers than black persons with low certification. Almost all persons with low certifications have been hired from the local population just before the school year opened, after efforts to obtain better qualified persons, black or white, had failed to fill the ranks. The small percentage of black persons in Charles County who have a college education, as compared with white persons who have a college education is the reason why relatively few of them have been hired. In the last four years only

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[9] The recruiters have regularly visited all of the predominantly black colleges and universities in Maryland and the District of Columbia, as well as the predominantly white public colleges and universities, which are making serious efforts to obtain black students; over the years they have also visited some black colleges in othe states. The number of institutions visited has varied from time to time. Recently only colleges and universities in Maryland and the District of Columbia have been visited, but tho-e visited have large numbers of black students in the field of education.

twelve persons with low certifications or no degree have been hired; of those nine were white and three were black.

Plaintiffs also argue that in the most recent years the average experience of black teachers hired has been greater than that of white teachers, and that this shows a pattern of prejudice. The differences are slight, and the tables plaintiffs refer to show that they are often explained by the hiring of a very few people who interrupted their teaching for reasons not shown by the evidence and were rehired during the years in question.

The court finds that the policies of defendants with respect to the recruiting and hiring of teachers does not tend to prove a policy of racial discrimination.

(4) Secretaries and Custodians

Plaintiffs argue that the high percentage of black custodians and the relatively low percentage of black secretaries is evidence of a pattern of racial prejudice. The evidence does not support this contention. The percentage of black secretaries (about 18%), is greater than the percentage of blacks in Charles County with a high school education, despite the greater attractions of a job in the City of Washington or Prince George's County. No testimony was offered with respect to the hiring of custodians.

B. Complaints to State Board of Education

Sometime before the summer of 1969 the Charles County Branch of the NAACP received complaints from several persons, in and out of the system, that they had not been appointed to some position for which they had applied or, in the case of two principals, that they had been demoted on account of their race. In June of 1969, before Starkey became Superintendent and before any of the other individual defendants became members of the Board, a disciplinary problem arose with respect to a substantial number of black students at the La Plata Senior High School.

The problem was not handled wisely. Some twenty students did not receive their diplomas at the commencement exercises. The parents of those students complained to the NAACP. That organization registered complaints with the State Board of Education on behalf of the several employees and the students.

The State Board appointed a committee of two blacks and two white to investigate the complaints, to note any deficiencies in the progress of integration, and to make recommendations to the State Board. They were not charged to apply constitutional or statutory standards. The committee interviewed many people and made a report, which the State Board discussed with representatives of the Charles County school system and of the NAACP branch. The State Board then filed a careful opinion, dated July 16, 1970, not purporting to be based on constitutional or statutory principles, adopting some of the recommendations of the investigating committee, modifying some and refusing to adopt others. The opinion also included some good advice to the Charles County Board.

The court finds that a good faith effort to comply with almost all of the recommendations has been made. Any failure to comply with one or more of them does not tend to prove the intention of any defendant to discriminate against black people because of their race.

C. H.E.W. Action

In the spring of 1973 the Board, through Starkey, applied to the Federal Department of Health, Education and Welfare (H.E.W.) for funding under the Emergency School Aid Act (ESAA) of a "Basic Project" and a "Special Reading Project." Ted Nixon, a Civil Rights Specialist in the Regional Office of H.E.W., went to Charles County with a letter from the Regional Civil Rights Director to Starkey which called attention to certain pro-

visions of the Regulations, stated that Charles County had had a disproportionate reduction of black principals since the 1964-65 school year, and asked that certain information be submitted within three days. While in the County, Nixon interviewed various persons, and Starkey sent him a letter dated June 7, giving the requested information about twelve persons.

On June 22, 1973, the Regional Office sent Starkey a letter from Walker F. Agnew, the Regional Commissioner,[10] citing ESAA Regulations, 45 CFR § 185.43(b) (2), and § 706 (d) (1) (B) of Public Law 92-318,[11] and stating that because of the demotions of Mrs. Elnora Pinkney and James Sweatt from principal to vice principal in 1965-66 and the failure to appoint them as principals in subsequent years, and because during the visits of Nixon to Charles County "the resolution of the problem was not effected," the Charles County application was rejected without a hearing.

Defendants do not question the right of H.E.W. to deny funding if the statute and the regulations are not complied with. Defendants properly note that the language of that statute and of the regulations goes beyond the requirements of the Constitution and the statutes upon which plaintiffs rely in his case. Defendants also argue that some of the conclusory statements in the Agnew letter should not be given much, if any, weight by this court. The court agrees.

D. Burden of Proof

The evidence does not show a pattern of racial discrimination. See particularly the facts set out above under the headings "Principals and Other Administrators" and "Recruiting and Hiring Teachers."

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[10] But evidently prepared and sent by Nixon, because a copy was sent to Agnew.

[11] Codified as 20 U.S.C. 1605 (d) (1) (B).

This case is nothing like *Chambers* v. *Hendersonville City Board of Education*, 364 F.2d 189 (4 Cir. 1966), *North Carolina Teachers Assn.* v. *Asheboro City Board of Education*, 393 F.2d 736 (4 Cir. 1968), or *Walston* v. *County School Board of Nansemond County*, —— F.2d —— (4Cir. 1974).[12] In each of those cases a substantial number of black teachers had been discharged when the schools were integrated. In the instant case there is no claim or evidence that any teacher or principal was discharged because of his or her race. Over the years three black principals have been demoted.[13] One of the three (William Griffis) was an original plaintiff; one (Mrs. Pinkney) intervened as a plaintiff in the fall of 1973; their cases are discussed individually below. The third (James Sweatt) is not a plaintiff and did not testify in this case; he made a statement to the State Board that he did not think he had been discriminated against. In the case of Griffis this court has found that the principal was not demoted on account of his race; in the case of Mrs. Pinkney, the court is granting relief because of failure to appoint her to another principalship. That one instance does not prove a pattern.

The burden of proof remains on each plaintiff to prove his or her case by a preponderance of the evidence. Of course, each plaintiff may rely on the testimony of the other plaintiffs and the evidence offered on behalf of all of them, as well as any evidence offered by defendants.

E. Individual Claims

(1) Infant Plaintiffs—Racial Composition of Faculties

Counsel for infant plaintiffs and their parents have presented a table showing the percentage of white and black

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[12] Nor are the facts of this case like those in *Chance* v. *Board of Examiners and Board of Education of the City of New York*, 330 F. Supp. 203 (S.D. N.Y., Mansfield, J., 1971), affirmed 458 F.2d 1167 (2 Cir. 1972), or any of the other cases cited and relied on by plaintiffs.

[13] Principals have tenure as teachers not as principals.

teachers in each school over a period of years, and argue that this shows racially identifiable faculties throughout the system. Plaintiffs argue that the percentage of black teachers in any school should never be more than 25% more or less than the percentage of black teachers throughout the system.

The law controlling this case is set out in *Nesbit* v. *Statesville City Board of Education*, 418 F.2d 1040 (4 Cir. 1969), as follows:

> "All plans must include provisions for the integration of the faculty so that the ratio of Negro and white faculty members of each school shall be approximately the same as the ratio throughout the system. In determining the ratio, exceptions may be made for specialized faculty positions;" 418 F.2d at 1042.

That decision followed closely *United States* v. *Montgomery Board of Education*, 395 U.S. 225 (1969), where the Court approved Judge Johnson's order that the board must move toward a goal under which in each school the ratio of white to Negro faculty members is substantially the same as it is throughout the system. 395 U.S. at 232, 236.

The tables show that Charles County has been moving toward the goal with reasonable speed. The ratio suggested by the attorneys for the plaintiffs has been substantially attained in all but five of the twenty-six schools in the current school year. One of the five is the Vocational Technical Center, which includes many "specialized faculty positions." See 418 F.2d at 1042, quoted above. In three of the other four schools the shifting of one teacher would bring the school into conformance with plaintiffs' suggested test; in one other school the shifting of two teachers would be necessary.[14]

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[14] There are five other schools in which the variance from plaintiffs' suggested test is less than one percent. This is substantial compliance.

Teachers are not fungible. Some are trained in one subject, some in another. Some have developed special skills for dealing with particular subjects or with students or groups of students having particular problems. The purpose of a school system is to give students the best possible education, including preparation for life in America in the last quarter of the Twentieth Century. This must be done in accordance with constitutional requirements established by the Supreme Court. It is not always, if ever, an easy task. See discussion in *Walston* v. *County School Board of Nansemond County, supra,* —— F.2d at —— (slip opinion p. 15).

Moving teachers who have lived or taught or both in a particular rural area for years and are familiar with the problems of that area may be not only unkind to the teachers but harmful to the educational progress of the students. Nevertheless, this court is bound by the decisions of the Supreme Court and of the Fourth Circuit to declare that the Board and the Superintendent should take steps to assure that in the schools without specialized faculty positions "the ratio of Negro and white faculty members shall be approximately the same as the ratio throughout the system." 418 F.2d at 1042.

That should be done before the opening of the 1974-75 year.[15] Efforts should be made to change the ratio in the Vocational Technical Center whenever that is practicable.

In view of the progress made by defendants, it would not be appropriate for this court to issue the injunction sought by the two infant plaintiffs.

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[15] The court recognizes the difficulties which exist because of the small number of teachers in some of the schools and the fact that a single retirement, death or illness before or during a particular school year may create an imbalance. Nevertheless, the Board and staff should make every reasonable effort to meet the required test.

(2) Demotions

Elnora Pinkney

From 1952-53 through 1965-66 Mrs. Pinkney was an elementary school principal at the Bel Alton High School, which was conducted in the same building as the Bel Alton High School. Both schools had only black pupils during that period. In 1965-66 Mrs. Pinckney was principal of grades 1-6, with 275 students, and James Sweatt, also black, was principal of grades 7-12.

As a result of the plan of integration, Bel Alton became a consolidated school, with one principal and a vice principal. Grades 1-5 and 9 were the only grades at Bel Alton during the year 1966-67. Of the 602 students in the school that year, 405, of whom 216 were white, were in grade 9. Bel Alton was classified by the State Department of Education as a high school, and its principal had to hold a certificate as a secondary school principal. Mrs. Pinkney did not have such a certificate. James Campbell, a white man, who had such a certificate, became principal of the consolidated school. Mrs. Pinkney became vice principal, in accordance with the general policy of having the vice principal black when the principal was white, and vice versa.

As vice principal in 1966-67 Mrs. Pinkney went onto the vice principal scale. Although her salary in 1966-67 was about the same as her salary as principal in 1965-66, she made less than she would have made as a principal, depending upon the size of the school.

Starkey knew that Mrs. Pinkney wanted to be a principal, and told her when she was appointed vice principal of Bel Alton in the summer of 1966 that he hoped she would take the position until something better came along. Mrs. Pinkney served as vice principal at Bel Alton for three years, ending in 1968-69.

Four principals for elementary schools were appointed or shifted for the year 1969-70, because of the opening of

a new school, the Gale-Bailey School. Mrs. Pinkney filed a timely application for appointment as a principal for the year 1969-70.

The principalship of Gale-Bailey, a school with 463 students, was filled by the transfer of Dale Arbogast (white) from Indian Head, 738 students. The principalship of Indian Head was filled by the transfer of Fred Berry (white) from Dr. Mudd, 564 students. The principalship at Dr. Mudd was filled by the transfer of a white woman from Waldorf, 320 students.

The principalship at Waldorf was filled by the appointment of a white woman, who had only a provisional certificate. None of the four persons appointed or shifted had greater qualifications than Mrs. Pinkney, whom the court finds to have been a thoroughly competent principal.

Shortly thereafter Mrs. Pinkney applied for and was appointed to the position of pupil personnel worker in the central office. She was offered the principalship of a very small school in 1973, when she was 65 or 66 years of age, but she naturally preferred to remain as pupil personnel worker, for which she had taken additional courses.[16]

The court finds that it was not unreasonable or discriminatory to appoint Campbell to be principal of the combined Bel Alton school in 1966, nor to appoint Mrs. Pinkney vice principal of that school. Moreover, limitations had run on acts in 1966 before this suit was passed.

But no adequate justification has been shown for passing over Mrs. Pinkney in favor of a white person in the four appointments of elementary school principals in the summer of 1969. The court does not depart from its finding, set out above, that there was no pattern of prejudice

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[16] The small size of the school would have meant a relatively low salary.

in the Charles County school system during the years in question. But the court does find that race was a factor in denying Mrs. Pinkney appointment as a principal before and during the year 1969-70, when a less qualified white woman and three other persons were appointed to elementary school principalships for which Mrs. Pinkney had applied.[17]

The court concludes that Mrs. Pinkney should have been appointed principal of the Indian Head School for the year 1969-70 and subsequent years. The salary she would have received and would continue to receive in that position is substantially greater than the salary she has received and presumably will receive in her present position. Counsel should agree upon the figures to be included in the judgment.[18]

Plaintiff has asserted a bona fide claim of more than $10,000, and this court has jurisdiction to grant relief to her.

William L. Griffis

Griffis came to the Charles County system in 1951 as principal of a two teacher elementary school; in 1954 he became principal of a six teacher elementary school; in 1961 he became principal of the Mt. Hope Elementary School, an eleven teacher school. That school became integrated for the school year 1967-68. Whereas in 1966-67 there had been 268 pupils, all black, in 1967-68 there were 293 pupils, 188 black, 105 white.

Griffis is a fine, sympathetic person, interested in people and anxious to help them. He is really too sympathetic to be a fully effective administrator.[19] For several years

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[17] The court does not accept defendants' argument that Mrs. Pinkney was too old for the job.

[18] Including any effect on retirement benefits.

[19] E.g., he had not submitted an unsatisfactory report on a teacher over many years.

before 1967-68 there had been some justified and some unjustified complaints about his effectiveness as a principal. In October 1967 Griffin met with Jenkins, Starkey and the chief personnel officer of the system, and the areas of ineffectiveness were discussed. In the spring of 1968 two of the supervisors were critical of his performance.

When it was rumored that Griffin would be transferred to another position the teachers at the school supported him; the parents of the students were divided. At the end of the year 1967-68, Jenkins transferred Griffin to the position of Administrative Assistant at the Indian Head School, a large school with 606 white, 478 black and 7 "other" students, and appointed a black man from outside the system to be principal of the Mt. Hope School.*

Griffin protested his demotion to the National Education Association, but the local organization of the NEA could not conduct an investigation because Griffin did not consent to the opening of his confidential file. He also refused to allow his file to be shown to a group of parents who protested his removal as principal at Mt. Hope.

Griffin was at Indian Head for two years. Thereafter, he has been assigned to various positions in various schools.

Beginning in February 1969 Griffin submitted four applications to be principal of an elementary school, but failed of appointment in each case. Griffin also applied for the position of Pupil Personnel Worker which Mrs. Flaherty, another plaintiff herein, received.

During the two years Griffin was Administrative Assistant at the Indian Head Elementary School, he was still

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* Only teachers have tenure; principals and vice principals have tenure only as teachers. The salary Griffin received as Administrative Assistant at Indian Head was $12,078.80, more than he had received during the past year, but less than he would have received ($12,726.80) if he had continued as principal at Mt. Hope.

icized for spending too much time on routine matters and not enough time on major responsibilities, and because he did not show initiative in the area of instruction. Each of the two principals under whom he served stated that they could not recommend Griffis for appointment to the principalship of an elementary school.

Six of the thirteen elementary principals appointed between 1969-70 and 1973-74 have been black.

Anyone without a stone heart must be sympathetic with Griffis. This court cannot find, however, that his demotion from principal of the Mt. Hope school to his position at the Indian Head school and the subsequent refusals to appoint him as principal of another school were not made in a good faith effort to improve the quality of the administration of the schools and to find the spot where Griffis' personality and abilities could be used to best advantage. The decisions were not made on the basis of race, or because of any racial prejudice.

(3) Failure to Promote

Joseph A. Jones

Dr. Jones, an intervening plaintiff, who was a teacher of health and physical education in Charles County in 1964-65 and is now on the faculty at Coppin State College, asserts no claim for damages and does not seek reinstatement or appointment to any position. It is not clear what relief, if any, he seeks, except to join in the claim for a broad injunction. He testified that sometime prior to the 1965-66 school year, he applied for the position of Supervisor of Physical Education for that year. No one was appointed until two years later. There is no record of his application for that position, and the evidence shows that he applied for a position on the Coppin faculty in April 1965 and was appointed. Jones contends that the Charles County position would have been given to a white man

if he had not applied and protested the proposed appointment. The evidence does not justify any such finding, and, in any event, the claim is barred by limitations and laches.

His second claim is also barred by limitations and laches. He testified that he made application in 1965 for a position as vice principal after a notice of vacancies showing that four such positions would be open. He contends that he was only considered for one of those positions—in a black school. This is not improbable, because the system was in the early years of desegregation and integration, see "History," above, but Jones delayed filing suit for so long that neither he nor defendants have any record of his application, if indeed it was made. There is a form, filled out by Jones, indicating both that he wished the same assignment that he had and that he did not expect to continue teaching in Charles County. The correspondence with respect to his resignation was produced by defendants, and does not support Jones' testimony.

Raymond F. Sanderlin

Between May 1971 and January 1973, Sanderlin filed seven applications for various positions in the Charles County system. One of the applications was successful. He claims that the rejections of his six other applications were motivated by racial considerations. The court finds that in none of the rejections did racial discrimination play any role.

Sanderlin's academic background and work experience were in the field of special education. He was a special education teacher from 1966 to 1971. He earned a master's in special education in June 1972; all of the courses which he took to earn that degree were in that field.

In May 1971 Sanderlin's application for admission to the Administrative Intern Program was rejected. Eight blacks had applied for admission to that program and

twenty-one whites; four blacks and six whites were accepted. All candidates for the position were required to take the Miller Analogy Test, on which Sandrlien scored very poorly.

The Miller Analogy Test is a recognized test used by many graduate schools in determining which applicants should be admitted. The use of that test in screening applicants for admission to the Administrative Intern Program is quite different from the use of the NTE Test condemned in *Walston* v. *County School Board of Nansemond County*, —— F.2d —— (4 Cir. 1974), where (1) the NTE Test was used to determine which experienced teachers should be discharged, (2) the developers of the test stated that it was "least valid when applied to experienced teachers," and (3) where the use of the test as the sole criterion resulted in the discharge of fifteen black teachers and only two white teachers. There was no such disproportionate result from the use of the Miller Analogy Test as one of the factors for admission into the Administrative Intern Program. Nor was use of the Miller Analogy Test subject to the criticisms of the tests which were discussed in *Chance, supra,* 330 F. Supp. at 209 et seq., 458 F.2d at 1170 et seq., 1174 et seq.

In October 1971, Sanderlin unsuccessfully applied for a position as a transportation specialist,[21] a position which encompassed responsibilities such as setting up bus routes, assessing transportation needs, and compiling mileage records. Sanderlin had no background in that area. Two persons were chosen for the positions: Otto Williams (black) and Charles Wineland (white). Wineland had

[21] Sanderlin claims not to have received any response to some of his applications. The Board did not have a large enough clerical staff to reply individually to each of the many applications received for all sorts of positions. Notice of the availability and notice of the filling of each position were posted on school bulletin boards; thus every staff member who checked the boards could learn of the status of any application he had submitted.

been certified in transportation by the State Department of Education; Sanderlin had not; it is not clear whether or not Williams had been certified.

In November 1971, Sanderlin applied for the position of "learning disabilities teacher," a position for which he was qualified. He received that position.

In November 1971, Sanderlin again applied for admission to the Administrative Intern Program. He was screened by a committee of six people in February; he was recommended by three, while the other three recommended him with reservations. He was appointed to the program by a letter dated March 3, 1972, but claims that he never received the letter. Whether or not Sanderlin received the letter became unimportant when the funding from the program was cut off before Sanderlin would have entered the program.

In May 1972, Sanderlin unsuccessfully applied for the position of principal. He did not then meet the minimum requirements for certification to be a principal, because he lacked the required courses in administration and supervision, as well as particular courses which are required depending upon whether certification is sought as an elementary or a secondary school principal.

Sanderlin unsuccessfully applied for the position of "Supervisor of Special Education" in the summer of 1972. He and two other candidates were screened, but the screening committee recommended a white candidate who not only had the formal preparation which Sanderlin had, but also had had administrative experience in Prince George's County. On the screening committee was James Sweatt, a black man, who was then Supervisor of Special Education and would have been familiar with Sanderlin's performance as a teacher over several years.

In January 1973, Sanderlin applied to be a diagnostic prescriptive resource teacher. The position was not funded, so no one was chosen.

The court finds that racial discrimination played no part in the rejection of any of Sanderlin's applications.

Cordelia King

Mrs. King claims that she was refused appointment as a principal or vice principal on several occasions because of her race.

After 20 years as a guidance counselor, Mrs. King applied in May 1971 for admission into the Administrative Intern Program, which was designed to develop principals, vice principals and other administrators. At the same time she applied for whatever positions as principal or vice principal might be open. She was accepted for admission into the Administrative Intern Program, but refused the opportunity because she learned that she could not be in that program and at the same time be a principal or a vice principal, and she hoped to be appointed to such a position at that time.

Mrs. King overlooked the fact that she needed 34 more semester hours to meet the minimum requirements set by the State Board for certification to be a principal, and the evidence shows that she was not eager to take such courses. When, during the previous autumn, her certificate to be a guidance counselor was in danger of not being renewed because she had not kept it green by taking six credit hours in her field in ten years, she asked Starkey to exercise his option to waive the requirement, and he did so. She wrote him a letter of appreciation in January 1971, in which she said: "Aside from saving many dollars, time and effort for me, it gave me peace of mind to return fully to the business at hand—counseling students. This is my calling and one which I love dearly." [22]

She was not appointed a principal or vice principal in 1971 or in the two subsequent years. It is interesting to

[22] Mrs. King is obviously an able and forceful guidance counselor.

note that some of the people in the Intern Program have been appointed.

Although both sides have argued many points, including the general policy of having a white vice principal when there is a black principal, and vice versa, the court finds that the reason Mrs. King was not appointed to the positions she sought was her lack of certification for a position as principal and her lack of willingness to do the work necessary to obtain it.[23] There was no racial prejudice or discrimination involved.

Kenneth Wright

Wright was employed by the Board as a general maintenance worker at the G-2 (semi-skilled) level from July 1967 until July 1973, when he resigned to take a higher paying position with another employer.

His first claim arises from the hiring of a white man, Samuel Oliver, in November 1971, at the G-3 (skilled) level, with higher pay than Wright and with supervisory status over him. Oliver had special qualifications to be hired at the G-3 level; he had experience in carpentry, masonry, grading, painting and paperhanging. Wright's experience was less than Oliver's, and it was believed that Wright would benefit by working under him. No racial factor motivated the hiring of Oliver at the G-3 level, with supervisory status over Wright.

Wright's second claim stems from the promotion of George Scott, a white man, to the only G-3 opening available for the 1972-73 school year, rather than Wright. Both the Director of School Facilities for the Board, and the foreman of the Maintenance Department believed in good

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[23] Defendants have reasonably believed that a person should not be appointed a vice principal unless he or she was prepared to advance to principal; they do not want a vice principalship to be a terminal job.

faith that Scott's talents were superior to Wright's at that time. Their evaluations were of the sort that supervisors often have to make. Their judgments were not influenced by any racial factor. A year later, in the summer of 1973, Wright was offered a promotion to the G-3 level, which he declined, because he was about to resign to take a position with another employer.[24]

(4) Terminations

Annie C. Yates

Mrs. Yates was employed by the Board as a cafeteria manager from 1963 to 1968.

In June 1968, Mrs. Margaret Posey, Supervisor of the School Lunch Program, sent a memorandum to all principals enclosing job specifications for cafeteria manager and stating: "All managers for 1968-69 will be expected to assume the full responsibilities listed." Theretofore some of those duties had often been performed by principals, school secretaries, teachers and students. Without objection from her principal, Mrs. Yates had arranged for one of her assistants to perform a part of her duties.

In July 1968, Mrs. Posey conferred with Mrs. Yates and her principal. Mrs. Yates was told of the new policy, and testified that she got the impression that her principal thought she was not qualified for the job, because it would entail more paper work than she could handle. Mrs. Posey told Mrs. Yates that if she felt that she couldn't handle the responsibilities of the position as manager, she was assured of a position as a full-time cook. Mrs. Yates thereupon submitted her resignation.

A white woman was promoted to cafeteria manager for the school for the year 1968-69, and another for the year 1969-70. In the summer of 1970, a black woman was ap-

[24] This offer was made before Wright intervened in this case.

pointed and served until November 1970, when Mrs. Yates' daughter was appointed and has held the position ever since.

The preparation of the job description was a good faith effort to upgrade the position of cafeteria manager throughout the system; the conference with Mrs. Yates was a legitimate attempt to assure that she knew her responsibilities and was willing to carry them out. There was no racial discrimination.

Milbourne Hull

After seven years as a teacher of vocational agriculture, and 23 years as an Assistant Professor of Agriculture with the Extension Service of the University of Maryland from 1944-1967, Hull was employed by the Board as Assistant in Federal Programs for the school years 1967-68 and 1968-69. His salary of about $14,000 was funded principally by the Federal Government, the rest by the Maryland State Department of Education and Charles County.

The arrangement did not work out well. Starkey felt that Hull was a good liaison man with the Federal Government, but that he was not a good administrator. During the year 1968-69 some of his responsibilities were assigned to others.

In February 1969 Starkey advised Hull that the proposed budget for 1969-70 eliminated the position Hull held, but that it provided for a joint program with St. Mary's and Calvert Counties. Starkey said that he would keep Hull advised so that he could apply for the tri-county position if he was interested.

The tri-county program did not materialize, not through any fault on the part of Charles County, and the Charles County budget for 1969-70 as finally passed eliminated the position of Assistant in Federal Programs. The position

was reinstated in the budget for the following year and filled by another black man.

On May 17, 1969, Hull asked to be appointed Assistant Superintendent or Coordinator of Federal Programs or Coordinator of Recruitment of Personnel, positions which did not exist.

On June 27, 1969, Starkey informed Hull that the funds for the tri-county program for federal programs had been eliminated from the budgets of all three counties and reminded him that no funds had been provided for the position of Assistant in Federal Programs. He informed Hull that his contract terminated June 30, 1969, but that defendants could provide Hull with work for about ten days. He suggested that Hull contact Leviner, the Director of Personnel, about teaching positions which might be available.

Hull was screened for the position of administrative assistant to the superintendent on July 3, 1969, along with three others. The Screening Committee recommended John Bloom for the position. Hull was also recommended with the observation that he lacked school administrative experience. The position was not filled.[25]

He was given an opportunity to apply for a position as teacher or vice principal, but told Starkey that he was not interested in teaching and would accept a vice principal position only with the understanding that he could resign upon fifteen days' notice.

Hull secured the services of an attorney, James Mitchell, who by letter of July 30, 1969, requested that the Board employ Hull during August 1969, in order to enable him to seek another job. Hull was given a position from August 7 to August 31. He obtained employment with H.E.W. in

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[25] Later, other persons, white and black, applied for the position, including Mrs. Bertha Key, but the position was not filled during that school year.

Charlottesville late in 1969, and later at Temple University, at salaries lower than his Charles County salary.

Hull had no tenure and knew it. The termination of the position he held in 1968-69 was not due to his race. Starkey was willing to give him certain jobs, but not those which Hull unrealistically asked for.

(5) Failure or Refusal to Hire

Mrs. Bertha W. Key

Mrs. Key makes two claims of discrimination. In her first claim, she alleges that she applied for the position of Reading Coordinator in Charles County in 1963-64, but was denied the position on the basis of her race. Mrs. Key first asserted that claim in November 1973 when she intervened in this case, almost ten years after any such claim accrued. Her first claim is barred by the statute of limitations.[26]

Mrs. Key's second claim stems from her application for the position of Administrative Assistant to the Superintendent in August 1969. Mrs. Key applied for the position, and was screened for it. At her screening session, several of the interviewers expressed an interest in hiring Mrs. Key for the position of administrative assistant to a principal, but Mrs. Key was only interested in the position of Administrative Assistant to the Superintendent. Because of severe budget cuts, that position was not funded or filled.[27]

She was not discriminated against on the basis of race.

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[26] The statute of limitations was tolled on this claim from January 22, 1971, until November 1973. See Class Action discussion, above. The claim was already barred when this action was filed.

[27] If the position had been filled, it is doubtful that Mrs. King would have been appointed; each of the five persons who interviewed her, including two blacks, recommended her for the position with reservations.

Sandra Washington Hearns and Lacey Tillotson

In late May 1968 Mrs. Hearns, Miss Tillotson and another black woman came to Charles County to interview for two summer positions in social work, one with a Title I program, and one with Head Start. Two of the three now claim that they were discriminated against on the basis of race. The two jobs were awarded to two white women, who had the necessary qualifications, but all of the records, except those of the two women who were hired, were lost or destroyed before Mrs. Hearns and Miss Tillotson asserted any claim of discrimination. The first knowledge any of the defendants had of such a claim was October 1, 1973. Although Mrs. Hearns and Miss Tillotson intervened as plaintiffs in November 1973, they did not testify either in person or by deposition, and the evidence offered in support of their claims is sketchy, at best.

Plaintiff Hull testified that he interviewed both women; that they were well qualified for the jobs; that immediately after he interviewed them, he was called to Superintendent Jenkins' office and was told that a white applicant for one of the positions had to have an immediate answer, and asked Hull's advice. Hull did not object to her appointment and did not inform Jenkins or Starkey, who was also present, that he had just interviewed three well qualified black applicants; there is no evidence that Jenkins or Starkey ever heard of them.

Although the two social workers who were hired were white, most of the staff in the combined programs was black. It seems that there would be some advantage in having a black social worker, but the evidence in the case does not justify a finding that they were not appointed because of racial discrimination.

Jerome Thompson

In February 1969 the Board and staff were looking for a Director of Purchasing. Thompson, who had worked

for the system as an accountant for two months before going into military service years before, and who had done accounting work in the service, learned of the opening, and applied for the position of Assistant in Purchasing.[28] He did not have a master's degree, which is a prerequisite to certification as director; indeed he did not have even a bachelor's degree, which is required for an Assistant in Purchasing, and he has not yet obtained his bachelor's. He was screened on March 3, 1969, along with several others, and John Gee, an experienced principal with a master's degree, who had also applied, was chosen on March 7, to assume the position on July 1. Meanwhile, on March 6, Thompson had applied for and obtained a job with the AAA, and started work on March 7. There was no racial prejudice involved.[29]

Joseph H. Morton

The Board opened its first Vocational Technical Center at high school level in September 1969, and during the 1968-69 school year sought a director for the center, a position equivalent to that of a high school principal. The policy of the Board was to require a master's degree for appointment as principal; a master's is a requirement for certification as a principal by the State Board of Education.[30] Two qualified persons had applied for the position

[28] The titles of Director of Purchasing and Assistant in Purchasing describe similar positions, which are labeled differently depending upon the degree which the person who holds the position has. A person with a master's would be a Director of Purchasing; one with only a bachelor's would be an Assistant in Purchasing.

[29] Plaintiffs claim that Gee was shifted to the position of Director of Purchasing because he was a poor principal. It is more likely that Gee was not happy in his principalship and therefore applied for the job, for which he was qualified and Thompson was not.

[30] This policy was regularly followed by the County Board at the secondary level; the only two exceptions have been one black man as principal who was within six months of obtaining his

but had withdrawn their applications, and Jenkins and Starkey (then Deputy Superintendent) hoped that the Board would modify the requirement. A staff member got in touch with Morton, who was then an instructor in industrial arts in Prince George's County, having previously taught in Charles County and having had work experience. Morton had a bachelor's degree in industrial arts and had taken some graduate courses.

Morton never filed a formal application for the position of director of the new center. He did speak to Starkey, and met with Jenkins and Starkey on March 26, 1969. They told him that the Board would have to decide whether or not it would waive the master's requirement. Jenkins and Starkey took the matter up with the Board, but since three of the five members were retiring in May, the Board decided that the choice of a director should be made after the new members had taken office.

Morton had an offer of a position in another system as to which he had to make a decision promptly. Accordingly, he talked to Starkey on the phone four or five times, and withdrew his application in early May, before the new board members met. He took the other job and does not claim that he has lost any money as a result of not obtaining the directorship.

The Board stuck to its requirement of a master's degree, and appointed a white man with a master's and who was certified in administration, but had no experience in vocational education.

Morton testified that he felt he had been "given a run around." The court does not find that to be a fact, and

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master's and one black man as acting principal for the remainder of a school year. There have been some exceptions at the elementary level, but one black and one white principal without master's degrees have been demoted, and all principals now have master's degrees.

finds that he was not denied employment or demoted for any racial reason.

Veronica Adams

Miss Adams completed the commercial course at a high school in Prince George's County and graduated with honors in June 1969. She lived in that county with an aunt, who persuaded her to apply for a position with the Charles County Board in August 1969. She was interviewed by Douglas Kincaid, who had just assumed the position of Director of Personnel. She filled out an application in which she wrote an incorrect telephone number. Kincaid obtained her school records, and attempted to reach her on the telephone three or four times to come in for a typing test. It was the policy at that time to make such appointments by telephone and to write to the applicant only if she had not given a phone number where she could be reached.

Miss Adams made no effort to follow up her application (except possibly for one phone call, of which neither she nor defendants have any record). She made no effort to get any other job for at least a month; she named no member whom she tried to get a job, but was employed by a Washington company in December 1969. She worked at that job for two and a half years. She did not make or file any complaint or grievance to or with the State Board or the County Board or any member thereof.

Charles County then had about 17 Black secretaries out of a total of about 76. There is no evidence that any other Black applicant for a position as secretary was ever turned down. Defendants would like to hire more Black secretaries, but the competition from Prince George's County and the many offices in Washington make this very difficult.

Miss Adams was not denied employment by the Board for any racial reason.

Conclusion

Counsel should prepare a judgment order embodying (1) a declaratory judgment with respect to the racial composition of faculties, (2) a judgment in favor of Elnora Pinkney, and (3 a judgment denying all other claims, in accordance with the opinion. The judgment should also contain an award of counsel fees in accordance with a supplemental opinion which will be promptly filed.

/s/ Roszel C. Thomsen
United States District Judge

APPENDIX D

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Code

42 U.S.C. § 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind and to no other.

42 U.S.C. § 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Maryland Constitution

Article VIII § 1. General Assembly to establish system of free public schools.

The General Assembly, at its First Session after the adoption of this Constitution, shall by Law establish throughout the State a thorough and efficient System of Free Public Schools; and shall provide by taxation, or otherwise, for their maintenance.

Maryland Code, Article 77

§ 6. Duties

The State Board of Education shall, to the best of their ability, cause the provisions of this article to be carried into effect. They shall determine the educational policies of the State; they shall enact bylaws, rules and regulations for the administration of the public school system, which when enacted and published shall have the force of law. For the purpose of enforcing the provisions of this article, and the enacted and published bylaws, rules and regulations of the Board, the State Board of Education shall, if necessary, institute legal proceedings. The State Board of Education shall, without charge and with the advice of the Attorney General of Maryland, explain the true intent and meaning of the law, and shall decide all controversies and disputes that arise under it, and their decision shall be final; and the secretary of the State Board of Education shall have authority to administer oaths, in any part of the State, to witnesses in any matter pending before said Board.

§ 113. Discrimination on account of race, religion, color, national origin, or sex unlawful.

It shall be unlawful for the State Superintendent of Schools or any of his assistants, and for any board of education and any superintendent of schools or any of his

assistants to make any distinction or discrimination in favor of or against any teacher who may be employed in any of the public schools of this State, on account of race, religion, color, national origin, or sex except where the employment of a certain sex may be reasonably necessary by reason of the nature of the employment, it being the intent and purpose of this section that the provisions thereof shall apply with reference to the appointment, assignment, compensation, promotion, transfer, dismissal, and all other matters pertaining to the employment of teachers in the public schools in the State of Maryland.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-609

JOSEPH H. MORTON, ET AL.,

Petitioners,

v.

CHARLES COUNTY BOARD OF EDUCATION, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland is reported in 373 F. Supp. 394 (D. Md. 1974) and is set forth in Appendix C to the Petition. The United States Court of Appeals for the Fourth Circuit affirmed. Its opinion is reported in 520 F.2d 871 (4 Cir. 1975) and is set forth in Appendix A to the Petition.

JURISDICTION

Petitioners assert this Court's jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Portions of the Fourteenth Amendment, the United States Code and the Maryland Code are set forth in Appendix D to the Petition.

QUESTIONS PRESENTED

1. Are the factual premises on which petitioners' base the questions presented in the Petition contradicted by the findings of the courts below?

2. In light of the findings of the District Court that the evidence did not disclose a pattern or policy of racial discrimination and the finding of the Court of Appeals that "[t]he record solidly supports the findings of the district court," was the Court of Appeals correct in affirming the conclusion of the District Court that the so-called *Chambers* rule [364 F.2d 189 (4 Cir. 1966)] was not applicable?

3. In finding that the evidence did not disclose a pattern or policy of discrimination, did the courts below also find there was no discriminatory effect?

4. Were the courts below correct in making independent findings of fact and law based on the evidence rather than considering themselves bound by statements of an *ad hoc* committee appointed by the State Board of Education?

STATEMENT

The experienced and careful District Judge (Roszel C. Thomsen), after hearing twelve days of testimony and

considering more than 300 exhibits, as well as extensive written and oral arguments, made comprehensive findings of fact. The Court of Appeals found that "[t]he record solidly supports the findings of the district court and, accordingly, they are not clearly erroneous." App. A, p. 7a, 520 F.2d at 878.

Petitioners totally disregard these findings and base their petition on assertions repudiated in the lower courts. Thus they begin their "Statement of the Case" by gratuitously asserting that the case "arises in a 'Deep South' district whose student bodies remained segregated until the late 1960s." The clear implication, fortified by a footnote, is that the Charles County Board of Education has resisted compliance with the decisions of this Court in *Brown v. Board of Education*, 347 U.S. 483 (1954) and 349 U.S. 294 (1955). To the contrary, the Charles County Board of Education voluntarily desegregated its schools following the *Brown* decisions by implementing steps which went further than those required at the time by applicable court decisions. The true facts were clearly stated in the opinion of the District Court in the following passage:

> "Charles County is a rural county, with many small communities. It is bounded on the north by Prince George's County, a much larger county, adjacent to the District of Columbia. It is bounded on the other three sides by two rural counties, Calvert and St. Mary's, and by the Potomac River. It has only recently received a substantial increase in population as a result of the expansion of the Washington suburbs.
>
> "In 1958, one year after the second *Brown* opinion, 349 U.S. 294 (May 31, 1955), the Board of Education of Charles County adopted a freedom of choice policy for students entering the first grade in the 1958-59 school year. All elementary grades were desegregated on a freedom of choice basis by

the 1960-61 year, all middle school grades by the 1961-62 year and all grades, including high school, by the 1962-63 year. For the 1964-65 year the Board eliminated the requirement that requests for transfers be approved, and required all parents to make an affirmative choice, in order to be sure that the right of freedom of choice was understood and exercised without restriction. That is all that was required by even the subsequent decisions of the Fourth Circuit in 1965 and 1967. *Bradley v. School Board of the City of Richmond, Virginia*, 345 F.2d 310 (April 7, 1965); *Bowman v. County School Board of Charles City County, Virginia*, 382 F.2d 326 (June 12, 1967). * * *

"The freedom of choice doctrine remained the law of the Fourth Circuit until May 27, 1968, when the Supreme Court decided *Green v. County School Board of New Kent County*, 391 U.S. 430.

"Meanwhile, in the summer of 1965 (nearly three years before the decision in *Green*), just after Starkey became Assistant Superintendent, the Board directed the staff to develop a reorganization plan for the complete integration of the system by redistricting according to geographical location, and providing for the necessary new buildings to take care of such integration as well as the increase in population of the County. The plan was adopted by the Board in October, 1965; it was implemented for the high schools for the 1966-67 school year and for the elementary schools for the 1967-68 year. App. C, pp. 21a — 23a; 373 F. Supp. at 396-97.

These findings were adopted by the Court of Appeals, which found that "unlike *Chambers* [*Chambers v. Hendersonville City Board of Education*, 364 F.2d 189 (4 Cir. 1966)] where the school system resisted 'the mandate of *Brown* until forced to do so by litigation,' . . . the Charles County Board had taken affirmative steps to desegregate its schools in the light of the evolving law and it is conceded that complete

desegregation in the county had been voluntarily accomplished in 1967." App. A, p. 5a; 520 F.2d at 873.

Petitioners then proceed to assert that in 1967 the Board of Education of Charles County suddenly changed its hiring and promotion practices so as to discriminate against black faculty and black principals. Again, the findings of the District Judge are explicit and to the contrary. The District Court found that between 1967 and the time when the present suit was heard, the number of black principals increased from 6 to 8, the number of black vice principals increased from 4 to 6, the number of black administrators in the central office rose from 4 to 10, the number of black teachers rose from 198 to 207, and "[n]o black teacher, principal, vice principal or administrator has been discharged during the years in question because of his or her race." App. C, p. 23a; 373 F. Supp. at 397. His findings continued as follows:

> "Plaintiffs contend that there has been a pattern of discrimination against blacks in the hiring and promotion of principals and administrators. The evidence does not support this contention. Aside from the case of Mrs. Pinkney, discussed below, the court finds that plaintiffs have not proved that any black person was not appointed principal or administrator because of racial discrimination.
>
> "The only occasions on which race was a controlling factor in the hiring or promotion of principals or vice principals was to carry out the policy of having a black vice principal where there is a white principal and a white vice principal where there is a black principal. The court finds that this policy at the present time in Charles County does not violate any constitutional right, and is a wise policy."

* * * * * *

> "No plaintiff contends that he or she was not appointed a teacher because of his or her race. Indeed there is no evidence that any qualified black applicant has been denied employment as a teacher." App. C, p. 24a; 373 F. Supp. at 398.

The District Court then described some of the Board of Education's affirmative efforts to recruit black faculty.

> "The recruiters have regularly visited all of the predominantly black colleges and universities in Maryland and the District of Columbia, as well as the predominantly white public colleges and universities, which are making serious efforts to obtain black students; over the years they have also visited some black colleges in other states." App. C, p. 25a, fn 9; 373 F. Supp. at 398, fn 9.

However, the District Court noted a general condition that made the Board's efforts to recruit black faculty more difficult.

> "The demand throughout the nation for qualified black teachers during the years in question has been great; Charles County offers fewer attractions for black teachers than such communities as the City of Washington and Prince George's County." App. C, p.25a; 373 F. Supp. at 398.

The fact is that the Charles County Board of Education has done a remarkably good job, and has been highly successful, in its efforts to employ and to promote black faculty and staff during a period in which the population growth in Charles County (46.4% from 1960 to 1970) had been great, but primarily white, and the percentage of the population which is black has decreased substantially. The percentage of black population in Charles County decreased between 1960 and 1970 from 34% to 29%, and the proportion of black student population decreased from 45.7% in 1960-61 to

34% in 1973-74. App. A, p. 6a; 520 F.2d at 874; App. C, p. 23a; 373 F. Supp. at 397. The 1970 Census figures showed that of the total population in Charles County 25 years of age or older with four years or more of college, an entry level requirement for teacher certification (JA 1103),* only 8.3% was black (JA 1206, 1208). Nevertheless, in 1973-74 the proportion of black professional staff overall was 29% (JA 1124), of black principals 30.77% (JA 1132), of black vice principals 46% (JA 1146), and of black central office personnel 22.2% (JA 1174), all well above the percentage of the relevant employment pool with entry level qualifications which was black. Further, as described previously, there was a notable increase in absolute numbers of black faculty and administrators over the period relevant to this case. From 1967-68 to 1973-74, the percentage of new principals who were black was 33% (JA 1139), and the percentage of new vice principals who were black was 35.3% (JA 1153).

Petitioners assert that the Court of Appeals found the decline in the proportion of black faculty was justified by the expanding white student population alone (p. 12), but this is an inaccurate and misleading characterization of the Court's opinion. The Court of Appeals, after discussing some of the statistical data in the record, stated:

> "The district court carefully analyzed the school statistics in the light of the percentage decrease of blacks in the general population as well as the school system, and also took into consideration the statistical data bearing upon the percentage of blacks in the relevant employment pool from which the School Board, of necessity, drew a substantial number of its employees." App. A, p.7a; 520 F.2d at 874.

* ("JA") refers to the Joint Appendix filed in the Court of Appeals.

The Court of Appeals thus recognized that the District Court analyzed three categories of statistical data, not one, including the percentage of both the relevant employment pool and the general population which was black.

After discussing the statistics relied on by petitioners, Judge Thomsen reached the following conclusion:

> "The court finds that the policies of defendants with respect to the recruiting and hiring of teachers does not tend to prove a policy of racial discrimination." App. C, p. 26a; 373 F. Supp. at 399.

Many of the assertions of fact in petitioners' Statement of Facts are based on an unofficial report of four individuals who had been requested by the State Board of Education to investigate complaints made by the Charles County branch of NAACP. This *ad hoc* committee did not purport to apply constitutional or statutory principles, there was no formulation of charges, nor was any opportunity afforded to cross-examine witnesses. Nevertheless, the committee made certain findings and recommendations which were considered by the State Board of Education. The State Board did not make any determinations of fact nor did it adopt any statements of the *ad hoc* committee concerning individual incidents (JA 862-870). Rather, in its July, 1970 opinion the State Board carefully limited itself to approving, modifying or disapproving specific recommendations, and the District Court found that ". . . a good faith effort to comply with almost all of the recommendations has been made." App. C, p. 27a; 373 F. Supp. at 399. As the Court of Appeals pointed out,

> "While the district judge permitted the committee report to be introduced into evidence, he ultimately reached the conclusion that its relevant findings lacked support and made his independent findings

> based on the evidence before him. In doing so he acted well within the permissible area of his discretion. Even if the report were conceded some official gloss its admissibility would be highly questionable, * * * and in any event, it 'is in no sense binding on the district court and is to be given no more weight than any other testimony given at trial.'" App. A, p. 9a; 520 F.2d at 875-76.

After considering the statistical data, the evidence concerning hiring practices, the history of desegregation efforts by the Charles County Board of Education, and administrative exchanges, the District Court concluded that the evidence did not show a pattern of racial discrimination. The District Court reached this conclusion on the objective facts and did not, as alleged in the Petition, require petitioners to establish an intent to discriminate or an impermissible racial motivation. The District Court held flatly:

> "The evidence does not show a pattern of racial discrimination." App. C, p. 28a; 373 F. Supp. at 400.

The Court of Appeals agreed based on its analysis of the record. App. A, pp. 5a-7a; 520 F.2d 873-74.

ARGUMENT

The disputed issues in this case were issues of fact, not of law, and the evidence did not support the contentions of petitioners. Consequently, this case does not raise any questions which would justify review by this Court.

I.

THE FACTUAL PREMISES ON WHICH PETITIONERS BASE THE QUESTIONS PRESENTED IN THE PETITION ARE CONTRADICTED BY THE FINDINGS OF THE COURTS BELOW.

The Statement shows petitioners' characterization of the facts in this case is inaccurate, misleading and contrary to the findings of the District Court which the Court of Appeals found to be "solidly" supported by the record. The Board of Education did not resist integration, but rather implemented measures voluntarily which fully desegregated its schools in advance of judicial decisions requiring the additional measures which the Board adopted. The Board did not alter its hiring and promotion practices so as to reduce the black faculty component, but rather, as the Court of Appeals found, took ". . . reasonable and affirmative steps to bring substantial numbers of qualified blacks into every facet of the school system." App. A, p. 8a; 520 F.2d at 875. While there has been a decline in the percentage of black professional staff in recent years, it has not been precipitous, and the absolute number of black professional staff and administrators has actually increased. In light of what the Court of Appeals characterized as ". . . dramatic demographic changes which occurred in Charles County in the 1960-1970 decade" (App. A, p. 6a; 520 F.2d at 874) and considering the low percentage of blacks in the relevant employment pool, the Board has been remarkably successful in maintaining a high proportion of black administrators and teachers.

The four specific factual premises on which petitioners base their questions presented either are contradicted by the record and findings below or are misleading. First, while the percentage of black professional staff declined from 42.9% in 1966-67 to 29% in 1973-74 (JA 1124), black professional staff increased

in absolute numbers and the Court of Appeals concluded that the proportionate decline was not the result of the Board's hiring policies, saying:

> ". . . the record clearly demonstrates that the statistical changes upon which the plaintiffs rely so heavily were not the result of any discriminatory hiring policies of the Board, but rather were the result of dramatic demographic changes which occurred in Charles County in the 1960-1970 decade." App. A, p. 6a; 520 F.2d at 874.

Second, petitioners assert the Board of Education made far greater efforts to recruit whites than blacks, but the Court of Appeals concluded: ". . . the record statisfies us that despite the changing population ratio the Board has taken reasonable and affirmative steps to bring substantial numbers of qualified blacks into every facet of the school system." App. A, p. 8a; 520 F.2d at 875.

Third, petitioners claim black applicants had to meet higher qualification standards, but this assertion is not supported on the record and, in response to this contention, the District Court found as follows:

> "Almost all persons with low certifications have been hired from the local population just before the school year opened, after efforts to obtain better qualified persons, black or white, had failed to fill the ranks. The small percentage of black persons in Charles County who have a college education, as compared with white persons who have a college education is the reason why relatively few of them have been hired. In the last four years only twelve persons with low certifications or no degree have been hired; of those nine were white and three were black." App. C, p. 25a; 373 F. Supp. at 398.

Fourth, petitioners state that assignments of teachers were made on the basis of race, but the District Court

found that "[t]he tables show that Charles County has been moving toward the goal [of faculty racial balance] with reasonable speed", and the Court found it would not be appropriate to issue an injunction. App. C, p. 30a; 373 F. Supp. at 401. Further, the Board of Education had obtained an appropriate faculty ratio in all but five of its twenty-six schools, and at one of the five imbalance was caused by the need for specialized faculty. Of the remaining four, in three schools the shifting of one teacher only would be necessary to meet the test suggested by petitioners. In the case of the other school, the shifting of two teachers would meet the test. The situation was thus not an aggravated one.

Statistical data must be analyzed closely to determine whether it is a meaningful indicator of racial discrimination in a particular case. Alleged statistical conclusions should be rejected where they lack substance. In *Mayor v. Education Equality League*, 415 U.S. 605 (1974) this Court reversed the Court of Appeals and upheld the district court's conclusion that percentage comparisons of the racial composition of a 13 member nominating panel and of the population of Philadelphia were unreliable, saying 415 U.S. at 620-21:

> "But the simplistic percentage comparisons undertaken by the Court of Appeals lack real meaning in the context of this case.
>
> * * * * * *
>
> "In sum, the Court of Appeals' finding of racial discrimination rests on . . . racial-composition percentage comparisons that we think were correctly rejected by the District Court as meaningless. In our view, this type of proof is too fragmentary and speculative to support a serious charge in a judicial proceeding."

The Court of Appeals was correct in giving due regard to Judge Thomsen's opportunity to judge the

credibility of witnesses (F.R.C.P. 52(a)) and to interpret the facts in the context in which they occurred, without being limited to the printed page. See *Mayor v. Educational Equality League, supra,* 415 U.S. at 621, fn. 20.

II.

THE SO-CALLED CHAMBERS RULE WAS NOT APPLICABLE.

An inference of discrimination is raised only where there has been both a history of racial discrimination *and* a sudden, disproportionate decimation in the ranks of black teachers at the time of desegregation. This Court stated the rule as follows in *Keyes v. School District No. 1 Denver, Col.,* 413 U.S. 189, 209 (1973):

> "Again, in a school system with a history of segregation, the *discharge* of a disproportionately large number of Negro teachers incident to desegregation 'thrust[s] upon the School Board the burden of justifying its conduct by clear and convincing evidence.' *Chambers v. Hendersonville City Board of Education,* 364 F.2d 189, 192 (4 Cir. 1966) (en banc)." (emphasis supplied)

In the instant case there was no sudden, disproportionate decimation in the ranks of black teachers nor was there a ". . . discharge of a disproportionately large number of Negro teachers incident to desegregation . . ." 413 U.S. at 209. In fact not one black teacher or principal was discharged, and the number of black teachers and principals actually increased over a period of several years. As found by the District Court:

> "In the instant case there is no claim or evidence that any teacher or principal was discharged because of his or her race." App. C., p. 29a; 373 F. Supp. at 400.

Further, there is no history of segregation since the *Brown* cases in the Charles County public schools. Rather, there is a history of voluntary efforts, first to integrate and then to desegregate fully, well in advance of judicial decisions requiring affirmative action of the type taken.

Consequently, on the facts of this case, the *Chambers* rule is not applicable.

III.

IN FINDING THAT THE EVIDENCE DID NOT DISCLOSE A PATTERN OR POLICY OF DISCRIMINATION, THE COURTS BELOW NECESSARILY FOUND THAT THE EVIDENCE DID NOT SHOW A DISCRIMINATORY EFFECT.

After reviewing all of the statistical evidence, the history of desegregation efforts for the Charles County public schools, and the administrative pronouncements and the Board's reaction thereto, the District Court concluded:

> "The evidence does not show a pattern of racial discrimination. See particularly the facts set out above under the headings 'Principals and Other Administrators' and 'Recruiting and Hiring Teachers.'" App. C., p. 28a; 373 F. Supp. at 400.

In other words, without reaching the question of the Board's intent or motivation, the District Court concluded as a matter of fact that no discriminatory effect had been shown, *i.e.* no pattern of discrimination existed. Further, the effect test in *Wright v. Council of City of Emporia*, 407 U.S. 451 (1972) requires action by the Board which has a discriminatory effect, and the District Court found ". . . that the policies of defendants with respect to the recruiting and hiring of teachers does not tend to prove a policy of racial discrimination." App. C., p. 26a; 373 F. Supp. at 399. Consequently, the effect test of *Wright* is fully satisfied.

IV.

THE COURTS BELOW CORRECTLY MADE INDEPENDENT FINDINGS OF FACT AND LAW BASED ON THE EVIDENCE AND WERE NOT BOUND BY STATEMENTS OF THE AD HOC COMMITTEE APPOINTED BY THE STATE BOARD OF EDUCATION.

As pointed out in the opinions of the courts below and in the Statement, *supra*, the *ad hoc* committee, on whose report petitioners rely so heavily, was not charged to apply either constitutional or statutory standards to its investigation, did not conduct an adversary proceeding, did not have its factual conclusions adopted by the State Board of Education, and had some of its policy recommendations adopted, some modified and some rejected by the State Board. The *ad hoc* committee's report was admitted into evidence, but the evidence before the District Court did not support its findings. See the Court of Appeals opinion, App. A., pp 8a-9a; 520 F.2d at 875-76.

This was not a proceeding to enforce an order of the State Board, and the State Board had issued no order to enforce. Under the circumstances the District Court was bound to make its own findings of fact based on all the evidence. The *ad hoc* committee's report was ". . . in no sense binding on the district court and is to be given no more weight than any other testimony given at trial." *Smith v. Universal Services, Inc.*, 454 F.2d 154, 157 (5 Cir. 1972).

CONCLUSION

Since no important issue is raised on the facts of this case as found by the courts below and as supported solidly by the record, it is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-609

JOSEPH H. MORTON, ET AL., *Petitioners*

v.

CHARLES COUNTY BOARD OF EDUCATION, ET AL., *Respondents.*

PETITIONERS' REPLY MEMORANDUM IN SUPPORT OF CERTIORARI

Respondents' patent effort to factualize the clear legal issues presented by the Petition evidences their own recognition of the unusual significance of those legal issues. And it could not be otherwise, for it is incontestable that the District Judge applied the *wrong legal standards* to the facts before him.

All three legal issues raised by the Petition are clearly before the Court. Thus, the majority and dissenting opinions both expose the issue whether the District Court properly placed the burden on the plaintiffs rather than requiring defendants to justify their practices which indisputably sharply reduced the black

faculty component when student desegregation was undertaken in 1967. The equally clear question of law presented is whether a "discriminatory effect" or a "racial animus" standard applies to those School Board hiring and promotion practices which have had a strongly adverse impact on the employment of minority teachers and principals. And equally presented is the question whether the District Court could totally shrug aside the State of Maryland's own determinations and remedial orders addressed to the Charles County school officials' discriminatory hiring and promotion practices. Thus, respondents' attempt to defuse and diffuse the Petition through a factual justification of their conduct cannot vitiate the three central legal errors which tainted the District Court's resolution of this case.

Moreover, the School Board's factual recitation to this Court wholly fails in its attempt to undermine the points on which we base our petition for review:

(i) In attempting to explain the adoption of an annual hiring ratio of four whites to one black in a school system which had approximately equal racial representation before black teachers were first generally assigned to teach white students, respondents repeatedly cite inapposite and inconsequential facts. Thus, they rely (Opp. pp. 7-8, 11) on a decrease in the proportion of black Charles County *residents* and a decrease in the proportion of black *students* in the Charles County School System during the 1960s which are totally irrelevant to the hiring of *teachers*. Further they point (*id.*) to the low percentages of Charles County black residents who hold college degrees, which equally fail to justify the School Board's failure to hire blacks when, as the record shows, the teacher hires come from

more than half the states in the nation (A. 1225-26, 1231, 1235-38. See Petition p. 15 n.8).

(ii) Concerning the School Board's discriminatory recruitment policies, respondents' reliance (Opp. p. 11) on the conclusory satisfaction of the majority below with the Board of Education's recruitment efforts cannot gainsay the undisputed fact that the School Board's recruiting was at mostly white colleges with mostly white recruiters (see Petition, pp. 6-7, 10).

(iii) Concerning the undisputed evidence that the Charles County School System hired numerous whites with the lowest State qualifications while hiring virtually no blacks with such limited qualifications, it is no answer for respondents to rely (Opp. p. 11) on the District Court's statement that such persons were hired from the local area just before the school year opened. The uncontested record shows that 60% of all new hires were *usually* hired that late in the school year (A. 873-908), and there is no evidence that these hires were drawn only from the local area. The only relevant evidence is the the School Board in general hires applicants from the majority of states in the nation.[1]

All apart from respondents' attempt to cloud the salient facts in this case, it is clear that petitioners were entitled to have the District Court review those facts under the proper legal standards. There is no possible dispute that the District Court refused to shift the burden of justification to the School Board for its hiring and promotion practices which sharply reduced the

[1] Respondents' reliance on their teacher assignments after this action was commenced in the one year just prior to the 1973 trial (Opp. pp. 11-12) hardly undercuts the undisputed record that during the preceding *six years* the school system assigned teachers on a racially identifiable basis in the majority of its schools.

black faculty component immediately after the desegregation of the student bodies.[2] There is thus squarely presented the issue of whether *Keyes-Chambers* requires transfer of the burden where the School Board has utilized the more "sophisticated" means of refusing to hire blacks instead of engaging in outright discharges.

Similarly, it is clear that the lower courts disregarded Maryland's own findings that respondents engaged in discriminatory employment practices and the State's orders to correct those practices.[3] The important issue whether the lower courts should have honored and given effect to the State's own action is thus clearly presented.

Also squarely raised is the lower courts' use of the motivation standard instead of the *Wright* "effect" test. Here the Charles County Board repeats (Opp. p. 14) its specious argument to the Court of Appeals that because the District Court found no "pattern of discrimination" the District Court applied an "effect" standard. But the majority of the Court of Appeals failed to accept respondents' assertion and

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[2] Respondents quibble (Opp. p. 14) that there is no "history of segregation" here because the School Board had adopted a freedom of choice plan for some years prior to 1967. But that program was totally ineffective, and the token transfers of a few blacks to white schools and a few whites to black schools in no way refute the undisputed fact that the student bodies and faculties remained essentially segregated until 1966 and 1967.

[3] While Respondents attempt (Opp. p. 8) to disparage the findings of the State Board's Committee because of the Committee's informal procedures —which Charles County itself had suggested—those findings were in fact the premise of the State Board's remedial orders.

do not at all suggest that the District Judge applied the effect standard. Moreover, a careful reading of the District Court's opinion exposes its application of the erroneous racial animus test (see Petition, pp. 23a, 24a, 27a, 29a, 34a, 36a, 40a-42a, 45a-47a, 49a). As dissenting Judge Butzner states, the District Court's Opinion contains "a basic error of law that flaws this case: the fallacious premise that the evidence must reveal purposeful discrimination in order for the complainants to prevail" (Petition, p. 12a).

In short, this case raises three vital legal issues which require grant of the writ.

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